# United States Court of Appeals for the Second Circuit



**APPENDIX** 

## 74-1437

## United States Court of Appeals

For the Second Circuit

#### Docket No. 74-1437

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL AND MILTON WEINGER,

Plaintiffs-Appellees,

against

David I. Koegel and Flora Mir Candy Corporation,

Defendants-Appellants.

On Appeal from a Judgment and Order of the United States District Court for the Southern District of New York

(72 Civ. 1901)

#### APPENDIX



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PAGINATION AS IN ORIGINAL COPY

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<sup>\*</sup>This document does not appear in the record on appeal and has been included at the request of plaintiffs-appellees. Although not apparently relevant to the issues presented, defendants-appellants reserve their rights to object to its inclusion.

### CIVIL DOCKET UNITED STATES DISTRICT COURT

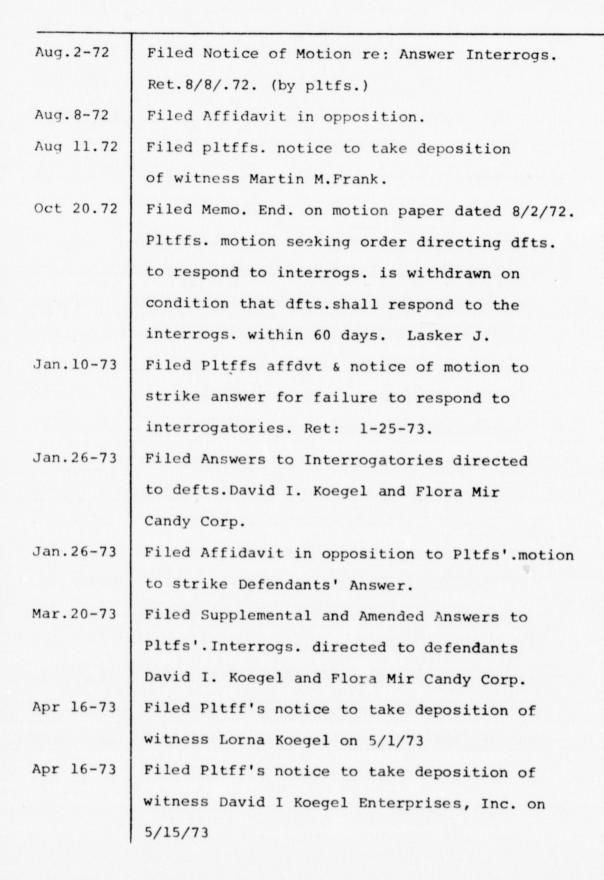
JUDGE LASKER 72 CIV. 1901

Jury demand date

D.C. Form No. 106 R	ev. BY PLTF	F.	5-	-8-72			
Title of Ca		Attorneys					
STEVEN FLAKS, WILLI ESTELLE JACOBSON, I MARTIN B. PERLMAN, INDUSTRIES, INC., J MILTON WEINGER, AGAINST,	SALON ORTNER, YAVERS,						
DAVID I. KOEGEL, AND FLORA MIR CANDY CORPORATION.			For defendant:  Kreindler,-Rolkin,Olick-& Goldberg 500-Fifth-Avenue NYC-10036(Defts-David-I- Koegel,-Flora Gandy-Corp.)				
Statistical Record	Costs		Date	Name or Re- ceipt No.	R	ecd.	
J.S. 5 mailed X	Clerk		5/8/72 5/9/72	Salon, O.	15		15
J.S. 6 mailed	Marshal						
Basis of Action:	Docket fee						
S.E.C. ACT. 1934							
	Witness fees						
Action arose at:	Depositions						

72	Civ.	1001	
14	CIV.	1901	

DATE	PROCEEDINGS Date Order Judgment No.
May 8-72	FILED COMPLAINT. ISSUED SUMMONS.
May23-72	Filed summons with marshal's return.
	Served David I. Koegel c/o Flora Mir Candy
	Corporation on 5/15/72.
	Also served Flora Mir Candy Corporation by
	David I. Koegel on 5/15/72.
Jun 8-72	Filed ANSWER of defendants David I. Koegel
	and Flora Mir Candy Corporation. KRO&d
Jun 15.72	Filed Dfts Notice to take deposition.
Jun 21.72	Filed Pltff. I. ORenstein Interrogs.
Jun 26-72	Filed Notice to take Deposition of witness
	Shirley Henschel.
Jun 26-72	Filed Interrogatories directed to deft.
	Flora Mir Candy Corp.
Jul 5.72	Filed Pltff. Irving Orenstein Notice to take
	deposition of D.I. Koegel Enterprises. Inc.
	Issued Subpoena.
Jul 5.72	Filed Pltff. Irving Orenstein Notice to take
	deposition of Fred Strauss. Issued Subpoena.
Jul 7.72	Filed Pltffs. Notice to take deposition.
Jul 18-72	Filed Notice to take Deposition of Alfred
	Straus.



	10
May 10-73	Filed defts supplemental answers to pltffs
	Interrogatories.
May 14-73	Filed defts supplemental answers to Pltffs
	Interrogatories.
Jun 14-73	Filed pltffs notice of motion, Re: Strike
	answers, ret before Lasker J. on 6/27/73
Jun 14-73	Filed defts notice of motion, Re; Withdraw
	as atty's for defts', ret before Lasker J.
	on 6/22/73.
Jun 21-73	Filed pltffs supplemental affidavit by
	Harold B. Lawrence/in support of pltffs
	motion to dismiss answer.
Jun21-73	Filed pltffs affidavit in opposition to
	motion of defts counsel for leave to with-
	draw.
Jun 21-73	Filed pltffs affidavit of service by Harold
	B. Lawrence.
Jun 21-73	Filed pltffs reply affidaivt by Harold B.
	Lawrence
Jun 21-73	Filed report and recommendation of Magistrate
	goettel.
Jun 21-73	Filed memo endorsed on motion papers dtd.
	1/10/73. Ordered that unless defts provide
	answers to items 20(a)(b)(c), 38, 45(b) &
	Filed memo endorsed on motion papers dtd.  1/10/73. Ordered that unless defts provide  answers to items 20(a)(b)(c), 38, 45(b) &  66(b) within 20 days after the date of the  entry of this order that the answer be stricken
	entry of this order that the answer be stricken and it is furhter ordered that atty's fees
	and it is furhter ordered that atty's fees

in the amt. of \$1,000.00 be assessed against defts, payable to the pltffs.

So Ordered Lasker J. m/n

Jul.26-73 Filed MEMO END. on motion filed Jun.14-73.

Motion to withdraw as attys for defts.

is granted. So Ordered. LASKER,J. (n/m)

Jul.26-73 Filed affdvt. of service of a letter dated. Jul.19-73.

July 31-73 Filed copy of memorandum endorsed filed 7-26-73

Cont'd on page 2

72 Civ. 1901 Steven Flaks, et al -v- David I. Koegel, et ano
72 Civ. 1901

LASKER, J.

Page 2

D.C.	110	Rev.	Civil	Docket	Continuation

DATE PROCEEDINGS Date Order Judgment No. Aug. 2-73 Filed memo endorsed on motion filed 6-14-74--Although defts' counsel withdrew (with permission of the Court) during the pendency of the annexed motion, defts. were given adequate time to find new counsel and failed to do so. The motion is granted. Submit order on notice addressed to defts. individually or to any counsel who may appear prior to the submission of any notice- Lasker, J. Aug. 22-73 Filed ORDER striking Answer of Defts. Ordered that motion stricking answer of defts. David Koegel and Flora Mir Candy Corp. is granted. Ordered that the Clerk of this Court enter judgment in favor of the pltfs. for the sums demanded in the complaint. LASKER, J.

Sep.10-73 Filed notice of appearance by W.C.S.M.&.W for defts.

Filed defts' memorandum of law in support Sep. 18-73 of their motion to vacate order striking answer. Sep. 18-73 Filed deft's affdyt. & notice of motion to vacate order striking answer-ret. 9-25-73-Sep. 24-73 | Filed pltffs. affdvt. in opposition to motion to vacate order Oct. 2-73 Filed consent and order to change deft. Atty. to David H. Shapiro, see front cover for address. LASKER, J. Dec. €-73 Filed affdvt of Arthur S. Olick amicus curiae. Dec. 6-73 Filed supplemental affdvt. of Harold B. Lawrence. Jan. 25-74 Filed affdvt. of David H. Shapiro Jan. 25-74 | Filed memorandum OPINION #40,287--Motion to vacate order dated 8-22-73, striking the answer of defts. and rendering default judgment is denied. It is so ordered --Lasker, J.-mailed notice. Jan. 28-74 | Filed Judgment #74, 117---pltff. Steven Flaks, recover of the defts. David I. Koegel & Flora Mir Candy Corp., jointly and severally the sum of \$100,000. with interest on \$50,000. from 10-1-68 at the rate of 6% for a total sum of

\$114,750 and costs---pltff. William J. Hacket

recover of defts., jointly and severally, the sum of \$100,000. with interest on \$50,000. from 10-1-68 at 6% for a total sum of \$114,750. and costs--pltff. Estelle Jacobson, recover of defts., jointly & severally the sum of \$100,000, with interest on \$50,000. from 10-1-68 for a total sum of \$114,750, and costs---pltf. Irving Orenstein, recover of defts., jointly & severally, the sum of \$100,000. with interest on \$50,000., from 10-1-68, at 6% for a total sum of \$114,750, and costs---Pltf. Martin B. Perlman, recover of the defts., jointly & severally, the sum of \$50,000., with interest on \$25,000., from 10-1-68 --at 6%, for a total sum of \$57,375., and costs,--Pltff. Sharkline Industries, Inc., recover of defts. the sum of \$50,000., with interest on \$25,000 from 10-1-68 at 6%, for a total sum of \$57,375, and costs--pltff. Jack Toppel, recover of defts. the sum of \$100,000., with interest on \$50,000., from 10-1-68 at 6%, for a total sum of \$114,750., and costs--pltff. Milton Weinger, recover of defts., jointly & severally the sum of \$200,000. with interest on \$100,000., from 10-1-68--at 6%, for a total sum of \$229,500., and costs--Judgement ent.1-28-74 entered--Clerk-m.n. Filed pltfs. notice of deposition of Lorna Koegel Filed pltfs. notice of deposition of David I.

Feb. 1-74

Feb. 1-74

	Koegel.
Feb. 1-74	Filed pltfs. notice of deposition of Flora Mir
	Candy Corp.
Feb. 1-74	Filed pltfs. notice of deposition of David I.
	Koegel, c/o Flora Mir Candy.
Feb. 1-74	Filed pltfs. notice of deposition of David I.
	Koegel Enterprises, Inc.
/8/74	Issued Execution on Jud #74,117 in the amount of
	\$918,000.00.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE

INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901 (MEL)

Plaintiffs,

JUDGMENT

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

Morris E. Lasker, United States District Judge, on the 13th day of June, 1973 for an order striking the answer of defendants herein and rendering judgment in favor of the plaintiffs having duly come on to be heard and an order having been duly made and filed by Hon. Morris E. Lasker, United States District Judge, on the 22nd day of August, 1973 granting the said motion and directing the entry of judgment as hereinafter provided, it is ORDERED AND ADJUDGED that

(a) Plaintiff, STEVEN FLAKS, recover of the defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$100,000 with interest on \$50,000 thereof from and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law,

- in the sum of \$14,750, amounting in all to the sum of \$114,750, and his costs of action;
- (b) Plaintiff, WILLIAM J. HACKETT, recover of the defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$100,000 with interest on \$50,000 thereof from and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law, in the sum of \$14,750, amounting in all to the sum of \$114,750, and his costs of action;
- (c) Plaintiff, ESTELLE JACOBSON, recover of the defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$100,000 with interest on \$50,000 thereof from and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law, in the sum of \$14,750, amounting in all to the sum of \$114,750, and her costs of action;
- (d) Plaintiff, IRVING ORENSTEIN, recover of the defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$100,000 with interest on \$50,000 thereof from and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law, in the sum of \$14,750, amounting in all to the sum of \$114,750, and his costs of action;
- (e) Plaintiff, MARTIN B. PERLMAN, recover of the

defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$50,000 with interest on \$25,000 thereof from and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law, in the sum of \$7,375, amounting in all to \$57,375, and his costs of action;

- (f) Plaintiff, SHARKLINE INDUSTRIES, INC. recover of the defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$50,000 with interest on \$25,000 thereof from and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law, in the sum of \$7,375, amounting in all to \$57,375, and its costs of action:
- (g) Plaintiff, JACK TOPPEL, recover of the defendants,
  David I. Koegel and Flora Mir Candy Corporation,
  jointly and severally, the sum of \$100,000 with
  interest on \$50,000 thereof from and after the
  lst day of October, 1968 at the rate of 6% per
  annum as provided by law, in the sum of \$14,750,
  amounting in all to \$114,750, and his costs of
  action;
- (h) Plaintiff, MILTON WEINGER, recover of the defendants, David I. Koegel and Flora Mir Candy Corporation, jointly and severally, the sum of \$200,000 with interest on \$100,000 thereof from

and after the 1st day of October, 1968 at the rate of 6% per annum as provided by law, in the sum of \$29,500, amounting in all to \$229,500, and his costs of action;

Dated at New York, N.Y. this 28th day of January, 1974.

/S/ RAYMOND F. BURGHARDT Clerk of Court UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-X

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901

MEMORANDUM

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

APPEARANCES:

SALON, ORTNER, YAVERS, DERSHOWITZ & RAYBIN, ESQS. 200 Madison Avenue
New York, New York 10016
Attorneys for Plaintiffs

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER, ESQS. 425 Park Avenue
New York, New York 10022
Attorneys for Defendants

Defendants move pursuant to Rule 60(b), Federal Rules of Civil Procedure, to vacate our order dated August 22, 1973, striking the answer of defendants and rendering judgment against them by default for the relief demanded by plaintiffs in their respective causes of action. The motion is denied, since we are not persuaded by the papers submitted by defendants on this motion that their repeated failures to cooperate in plaintiffs' requests for discovery demonstrated the good faith effort contemplated by the Federal Rules.

The prolonged tug of war between the parties began on June 20, 1972, when plaintiffs served certain interrogatories on defendants. Plaintiffs moved to compel answers on September 19, 1972, but, after consenting to a sixty day extension, found it necessary on January 4, 1973, to make a second motion compelling answers. At that point, the matter was referred to Magistrate Goettel who held a hearing on February 23, 1973. The defendants once more coaxed an extension of time, but the responses they eventually served were found inadequate by plaintiffs. At a third hearing, held on April 17, 1973, defendants were directed to submit supplemental responses by April 30. Several such responses were served but, since they were still inadequate in the opinion of plaintiffs' counsel, plaintiffs lodged a fourth request with Magistrate Goettel. By his carefully considered and complete report filed June 21, 1973, the Magistrate found that defendants had not adequately explained the absence of the pertinent books and records, nor had they raised cogent objections to their production. He also found that defendants had not been cooperating even with their own counsel in affording discovery, and recommended defendants' answer be stricken unless adequate response were served within twenty days, with attorneys' fees to be assessed against them. Still, defendants did not comply. In the meantime, parallel efforts to examine David I. Koegel, the principal defendant herein, were plagued by repeated adjournments, and finally by the failure of Koegel to appear for a scheduled deposition on June 7, 1973.

On June 14, 1973 plaintiffs filed a motion to strike defendants' answer, to which defendants filed no opposition papers, which we granted on August 2, 1973. Though plaintiffs served defendants with a copy of a proposed order of default judgment in advance of submission to the court, no response was forthcoming until the threat of actual judgment became clear.

We are unpersuaded by defendants' belated claims that their troubles in responding to interrogatories have flowed from difficulties with their original counsel, who are claimed to have obstructed Koegel's efforts to gather the necessary information. The Magistrate found in his report that Keogel was not cooperating with his counsel. Beginning as early as December 1972, he was repeatedly advised to retain substitute counsel, and this court itself so advised him by letter dated June 28, 1973. In view of these facts, Koegel's claim in his affidavit of September 10, 1973, in support of the motion, that he made diligent efforts to retain counsel late in July 1973 falls short of demonstrating his good faith: his own affidavit

states he was in North Carolina on business for almost all of the time he claims to have been seeking counsel.

Defendants' final contention, that they were not afforded a hearing before the award of costs against them, lacks merit, since Magistrate Goettel, after hearing on April 17, 1973, recommended the assessment of \$1,000 in costs. Defendants have not challenged the reasonableness of the figure, which is generally in line with sanctions imposed in similar cases. See Hendricks v. Alcoa Steamship Co., 32 F.R.D. 169, 171-72 (E.D. Pa. 1963) (approximately \$1,000); McFarland v. Gregory, 425 F.2d 443 (2d Cir. 1973) (approximately \$7,000); Fisher v. Harris, Upham & Co., Unreported Decision 69 Civ. 3312 (S.D.N.Y. 11/28/73) (\$5,000).

The motion is denied.

It is so ordered.

Dated: New York, New York January 25th, 1974

/s/ Morris E. Lasker U.S.D.J.

#### ENDORSEMENT

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER, Plaintiffs, v. DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION, Defendants. 72 Civ. 1901

LASKER D.J.

On the basis of the material set forth in the affidavit and supplemental affidavit of Harold B. Lawrence in support of this motion, and the exhibits attached to the Notice of Motion, and the Order of the court filed herein on June 21st, 1973 (which ordered that unless defendants provide answers to certain interrogatories within twenty days from the time of the court order their answer be stricken) and the failure of the defendants to appear at scheduled depositions or to respond to the present motion, the motion is granted.

Although defendants' counsel withdrew (with permission of the court) during the pendency of the annexed motion, defendants were given adequate time to find new counsel and failed to do so.

The motion is granted.

Submit order on notice addressed to defendants individually or to any counsel who may appear prior to the submission of any notice.

Dated: New York, New York August 2nd, 1973.

/s/ Morris E. Lasker U.S.D.J. ------

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STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901 (MEL)

ORDER STRIKING ANSWER
OF DEFENDANTS

Plaintiffs.

- against -

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

Plaintiffs having by motion dated June 13, 1973 duly moved for an order pursuant to Rules 37(d) and 37(b)(2)c for an order striking out the answer of the defendants, David I.

Koegel and Flora Mir Candy Corporation and rendering judgment by default against them and in favor ot [sic] the plaintiffs for the relief demanded by them in their respective causes of action, and, on the basis of the material set forth in the affidavit and supplemented affidavit of Harold B. Lawrence, sworn to June 13, 1973 and June 18, 1973, respectively, the exhibits attached to the Notice of Motion dated June 13, 1973, and the failure of the defendants to comply with the order of the court filed herein on June 21, 1973 and to respond to interrogatories, appear at scheduled depositions or respond to the present motion, the court having granted said motion on August 2, 1973, it is

NOW, on motion of SALON, ORTNER, YAVERS, DERSHOWITZ

and RAYBIN, Esqs., attorneys for plaintiffs, 200 Madison Avenue, New York, New York, it is

ORDERED, that said motion is in all respects granted and the answer of the defendants, David I. Koegel and Flora Mir Candy Corporation is stricken out; and it is further

ORDERED, that the Clerk of this Court enter judgment in favor of the plaintiffs for the sums demanded in the complaint with interest as therein demanded as follows:

- (a) in favor of the plaintiff, Steven Flaks, for the sum of \$100,000;
- (b) in favor of the plaintiff, William J. Hackett, for the sum of \$100,000;
- (c) in favor of the plaintiff, Estelle Jacobson, for the sum of \$100,000;
- (d) in favor of the plaintiff, Irving Orenstein, for the sum of \$100,000;
- (e) in favor of the plaintiff, Martin B. Perlman, for the sum of \$50,000;
- (f) in favor of the plaintiff, Sharkline Industries, Inc., for the sum of \$50,000;
- (g) in favor of the plaintiff, Jack Toppel, for the sum of \$200,000
  - (h) in favor of the plaintiff, Milton Weinger, for the sum of \$200,000.

Dated: New York, New York, September 1973 August 22,

> /s/ Morris E. Lasker U.S.D.J.

#### **ENDORSEMENT**

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL, and MILTON WEINGER, Plaintiffs, v. DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION, Defendants. 72 Civ. 1901

LASKER, D.J.

The motion by Kreindler, Relkin, Olick & Goldberg to withdraw as attorneys for defendants is granted.

The affidavit of Arthur S. Olick, Esq., sets forth more than adequate grounds for justifying the relief requested.

Neither the individual nor corporate defendant has put in any affidavit in opposition, although an opportunity has been granted them to do so, not only by the service of the Notice of Motion but by the court's letter specifically addressed to them dated June 28th, 1973. As indicated in that letter and at the conference held that date between counsel for the plaintiffs and the defendants and Jerome E. Goldman, an attorney, not retained by but representing the defendants, the court is prepared to act on plaintiffs' motion to strike defendants' answer and for a default judgment on July 27th, 1973.

The motion to withdraw is granted.

It is so ordered.

Dated: New York, New York July 25th, 1973.

> /s/MORRIS E. LASKER U.S.D.J.

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901

Plaintiffs,

-x

:

INTERROGATORIES
DIRECTED TO DEFENDANT
DAVID I. KOEGEL

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that you are hereby requested in accordance with the provisions of Rule 33, Federal Rules of Civil Procedure, to respond to the within interrogatories within thirty (30) days of the date of service upon you hereof:

"the defendant" and to "Koegel" in these interrogatories relate to the defendant David I. Koegel; all references to "Flora Mir" relate to defendant Flora Mir Candy Corporation, and do not include references to separate subsidiary entities; all questions relate to the time or times and for periods of time referred to in the complaint in this action).

1. During any of the times described in the complaint were you a holder of more than 10% of the stock of the corporation, either directly or through a nominee or relative?

- 2. With reference to every person who was a director of Flora Mir during the period from January, 1968 through December, 1968 inclusive, state
  - (a) the name and address of such person;
  - (b) the date he became a director;
- (c) the date he ceased to be a director, if he is no longer a director of the corporation;
- (d) whether such person was ever an officer of the corporation;
- (e) if so, state each office held by such person, the date when he became such officer and if he is no longer such an officer, the date he ceased to be such.
- 3. With reference to every person who was an officer of Flora Mir during the period from January, 1968 through December, 1968 inclusive, state
  - (a) the name and address of such person;
  - (b) the date he became a director;
- (c) the date he ceased to be a director, if he is no longer a director of the corporation;
- (d) whether such person was ever an officer of the corporation;
- (e) if so, state each office held by such person, the date when he became such officer and if he is no longer such an officer, the date he ceased to be such.
- 4. Was any written statement of the financial condition of Flora Mir and its subsidiaries for any period delivered

by the defendants or either of them, to any of the plaintiffs or to any person or persons acting in their behalf, at any time?

- 5. If the response to the previous question is affirmative,
  - (a) where was the statement delivered;
  - (b) who delivered the statement or statements;
- (c) to whom on behalf of the plaintiffs was such statement given;
  - (d) who prepared the statement;
- (e) what information respecting the financial condition of Flora Mir and/or its subsidiaries was disclosed therein?
- 6. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of MEADORS, INC., set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;

- (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 7. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of MARTHA WASHINGTON KITCHENS, INC. set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;

- (f) who negotiated the agreement on behalf of the seller of the stock.
- 8. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of DANDY CANDY CO., INC., set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 9. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of WELLONS CANDY CO., INC.,

set forth

- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 10. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of H. B. MORTON CHOCOLATE CORP., set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;

- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 11. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of FRANTZ CANDIES, INC., set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;

- (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 12. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of DOWDY CANDY CORPORATION, set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;

- (f) who negotiated the agreement on behalf of the seller of the stock.
- 13. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of MILARI OF NORTH AMERICA, LTD., set forth
- (a) the name of the corporation which acquired the stock:
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 14. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of BORAH NUT COMPANY, INC.,

set forth

- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 15. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of CUSTOM CANDIES, INC., set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;

- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;
    - (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 16. With respect to the acquisition by Flora Mir, or by any subsidiary or affiliated corporation, of shares of stock of FLORA MIR DISTRIBUTING CO., INC., set forth
- (a) the name of the corporation which acquired the stock;
- (b) the name and address of the seller of the stock;
- (c) whether said stock purchase was pursuant to an oral agreement or a written agreement;
  - (d) if written agreement,
    - (i) the date of the contract;
    - (ii) the names of all of the parties to the contract;

- (iii) the names and addresses of the persons who signed the agreement on behalf of the respective parties.
- (e) who negotiated the agreement on behalf of the purchaser of the stock;
- (f) who negotiated the agreement on behalf of the seller of the stock.
- 17. Were any legal actions or proceedings pending against Flora Mir as of May 31, 1968?
- 18. If the response to the preceding question is affirmative, state
  - (a) the court in which such action was pending;
- (b) any index number and/or calendar number assigned to such action in said court;
  - (c) the full title or caption of said action;
- (d) the amount of the claims made against each defendant therein and;
- (e) the amount of any counterclaims interposed against any plaintiffs therein, and on whose behalf interposed;
- (f) whether the same has been terminated or is still pending;
- (g) In the case of those actions which have been terminated, state in whose favor judgment was rendered and the amount of such judgment;
- (h) In the case of those actions which are still pending, state the present status of such actions.

- 19. Were debentures of Flora Mir issued to David I. Koegel Enterprises, Inc.?
- 20. If the response to the previous question is affirmative, state
  - (a) the date of the issuance of such debentures;
- (b) the terms of said debentures relating to face amount, date of maturity, interest rate and convertibility;
- (c) the consideration for issuance of said debentures;
- (d) the names and addresses of all of the persons who were, at the time of issuance of the said debentures:
  - (i) stockholders of David I. Koegel
    Enterprises, Inc.;
  - (ii) directors of David I. Koegel Enterprises, Inc.;
  - (iii) officers of David I. Koegel
    Enterprises, Inc.
- 21. Did the defendants or anyone acting on their behalf engage the services of the law firm of Levin & Weintraub, 225

  Broadway, New York, New York?
- 22. On what date was said law firm retained by or on behalf of the defendants or either of them?
- 23. What is the date of the earliest consultation held with any member of the law firm of Levin & Weintraub by anyone acting on behalf of the defendants or either of them?

- 24. What is the name and address of the attorney who referred the defendants or either of them to the law firm of Levin & Weintraub?
  - 25. On what date was such reference made?
- 26. State the name and address of each and every lawyer or law firm which rendered legal services to or was consulted by Flora Mir or any of the corporations named in these interrogatories or by any officer thereof with reference to the business affairs of such corporations or any of them during the period from April 1, 1968 to December 31, 1968.
- 27. State the name and address of each and every accountant or accounting firm which rendered accounting services to or was consulted by Flora Mir or any of the other corporations named in these Interrogatories or by any officer thereof with reference to the business affairs of such corporations or any of them during the period from April 1, 1968 to December 31, 1968.
- 28. In and about April, 1968 and thereafter did you on behalf of Flora Mir have any discussions or oral communications with respect to the financial affairs of the corporation with
  - (a) Stuart Graff:
  - (b) Ronald Neumark;
  - (c) Steven Flaks;
  - (d) William J. Hackett;
  - (e) Estelle Jacobson;
  - (f) Irving Orenstein;

- (g) Martin B. Perlman;
- (h) Jack Toppell;
- (i) Milton Weinger;
- (j) Sharkline Industries, Inc. or any person on behalf of Sharkline Industries, Inc.
- 29. Did any officer of Flora Mir other than David I.

  Koegel have any discussions on behalf of Flora Mir with respect
  to the financial affairs of the corporation with any of the persons named in Interrogatory No. 28?
- 30. If the response to the previous question is affirmative, were such discussions or oral communications effected by telephone or in meetings with the parties involved?
- 31. If telephone conversations were involved, state with respect to each such telephone conversation
  - (a) the date;
- (b) the name of the person who spoke on behalf of Flora Mir;
- (c) the name of the plaintiff with whom such conversation was had;
  - (d) the substance of the telephone conversation;
- 32. If such discussion and oral communication were in meetings between the individuals concerned, state with respect to each such discussion
  - (a) the date;
  - (b) the place;

- (c) the names and addresses of all persons who were present and/or participated in said discussions;
  - (d) the substance of such discussion.
- 33. Did Flora Mir Candy Corporation conduct any correspondence by mail with reference to the financial affairs of the corporation or sale of its debentures with any of the persons named in Interrogatory No. 28?
- 34. Did Flora Mir receive any money directly or through an agent from any of the persons named in Interrogatory No. 28 on account of debentures issued by Flora Mir?
- 35. Did you ever make any loans or advance any funds to Flora Mir or to any of the other corporations named in these interrogatories, either directly or indirectly though any corporation or person?
- 36. If the response to the previous question is affirmative, state
  - (a) the amount of such loan or advance;
- (b) whether same was represented or evidenced by a promissory note or other writing;
- (c) the terms of repayment thereof, including maturity date and interest rate.
- 37. Does David I. Koegel Enterprises, Inc. hold a promissory note or notes or other evidence of indebtedness made by Flora Mir and/or any other corporation named in these interrogatories?

- 38. If the response to the previous question is affirmative, describe each such note or series of notes by furnishing the following details:
  - (a) date of note or noces;
  - (b) maturity date or dates;
  - (c) interest rate;
  - (d) name of payee;
  - (e) name of maker.
- 39. Did Flora Mir or any other corporation named in these interrogatories ever acquire stock in any corporation in which
- (a) defendant Koegel was a stockholder, director or officer?
- (b) any person related to Koegel by blood or marriage, was a stockholder, director or officer?
- (c) any corporation in which Koegel, or any person related to him by blood or marriage, was a stockholder, director or officer?
- 40. If the response to any portion of the preceding question is affirmative,
  - (a) which corporation acquired such stock?
- (b) what was the name of the company whose stock was so acquired?
  - (c) on what date was such stock acquired?
  - (d) how many shares were acquired?
- (e) what was the consideration paid or agreed to be paid for said stock?

- (f) what were the terms of payment for said stock?
- (g) was the stock common or preferred stock or both?
- (h) was the stock with or without par value, or both?
- (i) was such stock acquired pursuant to a written agreement?
- (j) if so, state the date and the names of all the parties to such written agreement.
- 41. What was the total dollar amount of sales made by each of the following companies in their fiscal years ended as of the dates indicated below:
  - (a) Flora Mir Candy Corporation (May 31, 1968);
  - (b) Meadors, Inc. (May 31, 1967);
- (c) Martha Washington Kitchens, Inc. (September 30, 1967);
  - (d) Dandy Candy Co., Inc. (March 31, 1968);
  - (e) Wellons Candy Co., Inc. (December 31, 1967);
  - (f) H. B. Morton Chocolate Corp. (April 30,

1968);

- (g) Frantz Candies, Inc. (May 31, 1968);
- (h) Dowdy Candy Corporation (May 31, 1968);
- (i) Milari of North America, Ltd. (May 31, 1968);
- (j) Borah Nut Company, Inc. (May 31, 1968);
- (k) Custom Candies, Inc. (May 31, 1968);
- (1) Flora Mir Distributing Co., Inc. (May 31, 1968).

- 42. In and about the year 1968 did defendant Koegel or anyone acting on behalf of Flora Mir have discussions with or make any application to any bank or bank officer with respect to any non-equity financing of the operations of Flora Mir?
- 43. If the response to the previous question is affirmative, state
  - (a) the name of the bank;
- (b) the name of the bank officer with whom such discussions were had;
- (c) the approximately [sic] dates of said discussions;
- (d) whether same were by telephone or by personal conference;
- (e) whether any documents, memoranda or correspondence respecting the same are contained in the files of the corporation.
  - 44. As of May 31, 1968 did FLORA MIR own any
    - (a) accounts receivable;
    - (b) notes receivable;
    - (c) mortgage notes;
    - (d) inventory and/or stock;
    - (e) prepaid expenses;
    - (f) real property;
    - (g) machinery and/or equipment;
    - (h) furniture and/or fixtures;
    - (i) leasehold improvements.

- 45. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 46. With respect to said corporation, as of May 31, 1968 what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 47. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
  - 48. In addition to the notes payable hereinbefore

referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, moninterest bearing notes,
notes of subsidiary companies or chattel mortgages of subsidiary
companies, outstanding?

- 49. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 50. For the year ended May 31, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 51. As of May 31, 1968 did DOWDY CANDY CORPORATION own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;

- (e) prepaid expenses;
- (f) real property;
- (g) machinery and/or equipment;
- (h) furniture and/or fixtures;
- (i) leasehold improvements.
- 52. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 53. With respect to said corporation, as of May 31, 1968 what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?

- (h) any other obligations of the corporation?
- 54. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 55. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 56. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 57. For the year ended May 31, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.

58. As of May 31, 1968 did MILARI OF NORTH AMERICA, LTD., own any

- (a) accounts receivable;
- (b) notes receivable:
- (c) mortgage notes;
- (d) inventory and/or stock;
- (e) prepaid expenses;
- (f) real property;
- (g) machinery and/or equipment;
- (h) furniture and/or fixtures;
- (i) leasehold improvements.
- 59. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 60. With respect to said corporation, as of May 31, 1968, what was the amount of
- (a) total notes payable, including chattel mortgages?

- (b) chattel mortgages?
- (c) notes collateralized by accounts receivable?
- (d) notes collateralized by inventory?
- (e) unsecured notes?
- (f) collateral securing its notes payable?
- (g) inventory securing its notes payable?
- (h) any other obligations of the corporation?
- 61. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 62. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 63. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;

of

- (d) the amounts due after one year.
- 64. For the year ended May 31, 1968, state the amount

- (a) total sales;
- (b) cost of goods sold;
- (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 65. As of May 31, 1968 did BORAH NUT COMPANY, INC., own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) real property;
  - (g) machinery and/or equipment;
  - (h) furniture and/or fixtures;
  - (i) leasehold improvements.
- 66. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
  - (e) whether any appraisals of same indicate a

value different from that assigned to it on the books of the corporation.

- 67. With respect to said corporation, as of May 31, 1968, what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 68. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 69. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 70. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;

- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 71. For the year ended May 31, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 72. As of May 31, 1968 did CUSTOM CANDIES, INC., own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) rea property;
  - (g) machinery and/or equipment;
  - (h) furniture and/or fixtures;
  - (i) leasehold improvements.
- 73. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;

- (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 74. With respect to said corporation, as of May 31, 1968, what was the amount of
- (a) total notes payable, including chattel mort-gages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 75. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 76. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary

- 77. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 78. For the year ended May 31, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 79. As of May 31, 1968 did FLORA MIR DISTRIBUTING CO., INC., own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) real property;
  - (g) machinery and/or equipment;

- (h) furniture and/or fixtures;
- (i) leasehold improvements.
- 80. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 81. With respect to said corporation, as of May 31, 1968, what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 82. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former

shareholders, directors or officers of the corporation?

- 83. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 84. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 35. For the year ended May 31, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
  - 86. As of May 31, 1967 did MEADORS, INC., own any
    - (a) accounts receivable;
    - (b) notes receivable;

- (c) mortgage notes;
- (d) inventory and/or stock;
- (e) prepaid expenses;
- (f) real property;
- (g) machinery and/or equipment;
- (h) furniture and/or fixtures;
- (i) leasehold improvements.
- 87. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 88. With respect to said corporation, as of May 31, 1967, what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?

- (f) collateral securing its notes payable?
- (g) inventory securing its notes payable?
- (h) any other obligations of the corporation?
- 89. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 90. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 91. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 92. For the year ended May 31, 1967, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
  - (d) what terms are included as selling and

administrative expenses and the amount of each;

- (e) what was the amount of the net profit or loss.
- 93. As of September 30, 1967 did MARTHA WASHINGTON KITCHENS, INC., own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) real property;
  - (g) machinery and/or equipment;
  - (h) furniture and/or fixtures;
  - (i) leasehold improvements.
- 94. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 95. With respect to said corporation, as of September 30, 1967, what was the amount of

- (a) total notes payable, including chattel
- mortgages?
- (b) chattel mortgages?
- (c) notes collateralized by accounts receivable?
- (d) notes collateralized by inventory?
- (e) unsecured notes?
- (f) collateral securing its notes payable?
- (g) inventory securing its notes payable?
- (h) any other obligations of the corporation?
- 96. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 97. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 98. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.

- 99. For the year ended September 30, 1967, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 100. As of March 31, 1968 did DANDY CANDY CO., INC. own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) real property;
  - (g) machinery and/or equipment;
  - (h) furniture and/or fixtures;
  - (i) leasehold improvements.
- 101. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
  - (e) whether any appraisals of same indicate a

value different from that assigned to it on the books of the corporation.

- 102. With respect to said corporation, as of March 31, 1968, what was the amount of
- (a) total notes payable, including chattel mort-gages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 103. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 104. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 105. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;

106. For the year ended March 31, 1968, state the amount of

- (a) total sales;
- (b) cost of goods sold;
- (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 107 As of December 31, 1967 did WELLONS CANDY CO., INC. own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) real property;
  - (g) machinery and/or equipment;
  - (h) furniture and/or fixtures;
  - (i) leasehold improvements.
- mative, stat [sic] with respect to each type of property,
  - (a) location of same;

- (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 109. With respect to said corporation, as of December 31, 1967, what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 110. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 111. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary

- 112. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 113. For the year ended December 31, 1967, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 114. As of April 30, 1968 did H. P. MORTON CHOCOLATE CORP., own any
  - (a) accounts receivable;
  - (b) notes receivable;
  - (c) mortgage notes;
  - (d) inventory and/or stock;
  - (e) prepaid expenses;
  - (f) real property;
  - (g) machinery and/or equipment;

- (h) furniture and/or fixtures;
- (i) leasehold improvements.
- 115. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 116. With respect to said corporation, as of April 30, 1968, what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?
  - (e) unsecured notes?
  - (f) collateral securing its notes payable?
  - (g) inventory securing its notes payable?
  - (h) any other obligations of the corporation?
- 117. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former

shareholders, directors or officers of the corporation?

- 118. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 119. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 120. For the year ended April 30, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;
- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 121. As of May 31, 1968 did FRANTZ CANDIES, INC., own any
  - (a) accounts receivable;

- (b) notes receivable;
- (c) mortgage notes;
- (d) inventory and/or stock;
- (e) prepaid expenses;
- (f) real property;
- (g) machinery and/or equipment;
- (h) furniture and/or fixtures;
- (i) leasehold improvements.
- 122. If the response to the previous question is affirmative, stat [sic] with respect to each type of property,
  - (a) location of same;
  - (b) description of same;
- (c) the value assigned to same on the books of the corporation as of that date;
- (d) were any appraisals of the property made at or about that time;
- (e) whether any appraisals of same indicate a value different from that assigned to it on the books of the corporation.
- 123. With respect to said corporation, as of May 31, 1968, what was the amount of
- (a) total notes payable, including chattel mortgages?
  - (b) chattel mortgages?
  - (c) notes collateralized by accounts receivable?
  - (d) notes collateralized by inventory?

- (e) unsecured notes?
- (f) collateral securing its notes payable?
- (g) inventory securing its notes payable?
- (h) any other obligations of the corporation?
- 124. Was any of the indebtedness of the said corporation guaranteed by personal guarantees of present or former shareholders, directors or officers of the corporation?
- 125. In addition to the notes payable hereinbefore referred to, were there any other notes, mortgage notes, installment notes, chattel mortgage notes, noninterest bearing notes, notes of subsidiary companies or chattel mortgages of subsidiary companies, outstanding?
- 126. If the response to the previous question is affirmative, describe said obligations fully in terms of
- (a) whether same were represented by notes, mortgages or other written evidence of indebtedness;
- (b) the terms of payment including date of maturity, interest rate payable, installment provisions, collateral;
  - (c) the current maturity date;
  - (d) the amounts due after one year.
- 127. For the year ended May 31, 1968, state the amount of
  - (a) total sales;
  - (b) cost of goods sold;
  - (c) selling and administrative expenses;

- (d) what terms are included as selling and administrative expenses and the amount of each;
  - (e) what was the amount of the net profit or loss.
- 128. With respect to Paragraph "7" of the defendants' answer herein,
- (a) state the names and addresses of all of the persons who acted on behalf of Flora Mir in
  - (i) distributing information respecting the sale of the securities referred to in the complaint;
  - (ii) negotiating the terms and conditions of the sale of such securities with any prospective purchasers thereof;
  - (iii) fixing the amount of money to be raised by the offering of such securities;
  - (iv) determining the method of raising such amount for the corporation;
  - (v) assembling the financial information which was to be furnished to prospective purchasers of the said securities.
- (b) state the names and addresses of all of the persons to whom
  - (i) said securities were offered for sale;
- (ii) information was furnished respecting said securities.
  - 129. With respect to Paragraph "8" of defendants' answer

to:

- (a) who wrote the "purchace agreement" referred
  - (b) state, with respect to each plaintiff,
    - (i) when said plaintiff signed the agreement;
    - (ii) the place where said agreement was signed;
    - (iii) whether any other persons were present when said plaintiff signed the agreement;
    - (iv) if so, the names and addresses of such
      persons;
    - (v) whether such agreement bears the signatures of all plaintiffs on one copy or whether the agreement was signed in counterpart copies;
    - (vi) if the agreement was signed in counterpart copies, which other plaintiffs' signatures appear on the copy signed by subject plaintiff;
    - (vii) whether the page on which plaintiff's signature appears was attached to the rest of the agreement when it was signed;
- (c) the date when said purchase agreement was pre-

- (d) the date or dates when said purchase agreement was presented to the plaintiffs for signature;
- (e) the place where the purchase agreement was precented to plaintiffs for signature;
- (f) whether the defendants or anyone acting on behalf of them, was present at the execution of the agreement;
  - (g) if so, the name and address of such person.
- 130. With respect to Paragraph "9" of defendants' answer herein, state each and every representation contained in the said purchase agreement and the said debentures which defendants contend were "true and accurate in all respects", stating, with respect to each, whether the same is contained in the purchase agreement or in the debenture.

Dated: New York, New York

June 20, 1972.

Yours, etc.,

SALON, ORTNER, YAVERS, DERSHOWITZ AND RAYBIN, ESQS., Attorneys for Plaintiffs Office and P. O. Address 200 Madison Avenue New York, New York 10016

Tel. No. 532-9194

TO:

KREINDLER, RELKIN, OLICK and GOLDBERG, ESQS., Attorneys for Defendants 500 Fifth Avenue New York, New York 10036

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN,: MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and : PURSUANT TO RULE 60(b), AN MILTON WEINGER,

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

-----Y

Defendants.

72 Civ. 1901 (MEL)

NOTICE OF MOTION TO VACATE, ORDER STRIKING THE DEFEND-: ANTS ANSWER AND PROVIDING FOR THE ENTRY OF A DEFAULT : JUDGMENT

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of LAWRENCE G. SOICHER, ESQ., sworn to on September 12, 1973, and the respective exhibits annexed thereto, and the affidavit of DAVID I. KOEGEL, sworn to on September 10, 1973, and the respective exhibits annexed thereto, the undersigned will move this Court before the Honorable MORRIS E. LASKER, United States District Judge for the Southern District of New York, in Room 2903, at the United States Courthouse, located at Foley Square, City and State of New York, on the 25th day of September, 1973 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure vacating an Order of this Court entered August 22, 1973, providing for striking the answer of the defendants and for the entry of a default judgment, on the grounds that all of

the surrounding circumstances, including excusable neglect, justify relief from the Order in the furtherance of justice, and for such other and further relief as is just and proper under all of the circumstances.

PLEASE TAKE FURTHEP NOTICE that pursuant to Rule 6(d) of the Federal Rules of Civil Procedure, opposing affidavits, if any, must be served not later than one (1) day before the hearing of the within motion.

Dated: New York, New York September 14, 1973

Yours, etc.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER Attorneys for Defendants Office & P.O. Address 425 Park Avenue New York, N.Y. 10022

Tel.: (212) 371-5400

TO:

SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN, ESQS. Attorneys for Plaintiffs 200 Madison Avenue New York, New York 10016 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FLAKS, WILLIAM J. HACKETT,

ESTELLE JACOBSON, IRVING ORENSTEIN, : 72 Civ. 1901 (MFL) MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

AFFIDAVIT

STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK )

LAWRENCE G. SOICHER, being duly sworn, deposes and says that:

- 1. I am an attorney at law duly admitted to practice in this Court and am associated with the firm of WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER, attorneys for the defendants herein. I submit this affidavit in support of the within motion under Rule 60(b) to vacate an Order of this Court entered August 22, 1973, providing for striking the answer of the defendants and for the entry of a default judgment, on the grounds that all of the surrounding circumstances -- including excusable neglect -justify relief from the Order in the furtherance of justice.
  - 2. As can be seen by the annexed affidavit of David

I. Koegel, the failure of the defendants to respond to the plaintiffs' motion to strike the answer of the defendants returnable on June 27, 1973 was caused by their inability to retain new counsel by July 27, 1973, the date set by the Court for deciding said motion. Mr. Koegel's affidavit recites that he did not ignore the Court's warning -- contained in its letter addressed to the defendants dated June 28, 1973 -- that it would decide plaintiffs' motion by July 27, 1973, as Mr. Koegel did not receive said letter from the Court nor was he aware of its contents until his return to the United States from South America on July 17, 1973. From July 17, 1973 until the Court granted plaintiffs' motion without opposition on August 2, 1973, Mr. Koegel's affidavit recites in detail the unsuccessful attempts he made to retain new counsel. A copy of the Court's letter to the defendants is annexed hereto as Exhibit "1".

The difficulties Mr. Koegel encountered in attempting to obtain new counsel within the time period set by the Court for deciding plaintiffs' motion are borne out by the daily phone contacts that I am informed Mr. Koegel's personal attorney, Jerome E. Goldman, had with this Court's Law Clerk in order to report the continuous efforts being made by Mr. Koegel to secure new counsel and plead for additional time for him to obtain same. Annexed hereto as Exhibit "2" is a copy of Mr. Goldman's letter addressed to the Court dated July 18, 1973, in which he requests additional time for Mr. Koegel to obtain new counsel and to respond to the then pending motions. Mr. Goldman informs me that he did not receive a response to his letter, but on July 27, 1973 did receive a

copy of this Court's decision granting Mr. Koegel's prior counsel's motion to withdraw from the case. Mr. Goldman further informs me that from July 27th through August 1, 1973 he was in daily contact with this Court's Chambers to plead for additional time for Mr. Koegel to obtain new counsel and submit answering papers to plaintiffs' motions.

Mr. Koegel's affidavit recites that he was also inhibited from obtaining new counsel before the Court granted plaintiffs' motion because during the period of July 17, 1973 to August 2, 1973 he was required to be in North Carolina for a total of twelve (12) days, intermittently, in order to operate his business.

3. As can also be seen by Mr. Koegel's affidavit, the failure of the defendants to comply with this Court's Order of June 21, 1973, directing the defendants to further answer four specific items of the interrogatories, was due solely to the fact that the defendants were never served or made aware of said order until your deponent brought it to Mr. Koegel's attention recently after reviewing the Court file on this case. Apparently, defendants' prior counsel inadvertently neglected to nofity the defendants of this Order in view of their motion to withdraw from the case which was still pending at the time the Order was issued. The motion to withdraw was not granted until July 26, 1973.

A review of this Court's letter to Mr. Koegel dated June 28, 1973, reveals that no mention was ever made to Mr. Koegel of the June 21, 1973 Order of this Court.

4. It is apparent from Mr. Koegel's affidavit that the defendants previously made every good faith effort to fully

respond to the voluminous interrogatories propounded by the plaintiffs. This is supported by the fact that out of 130 separately numbered interrogatories, containing numerous subquestions totalling approximately 1,000 questions in all, this Court by its Order of June 21, 1973 and Magistrate Goettel in his Report dated May 22, 1973, found that only four specific interrogatories required further answers. These findings belie plaintiffs' claim of "obstruction of discovery". The good faith efforts of the defendants to answer the interrogatories is also evidenced by their submitting four separate sets of Answers to Plaintiffs' Interrogatories, on different dates, as outlined in detail in Mr. Koegel's affidavit.

In plaintiffs' zeal to proceed to judgment without a trial on the merits they employed the use of misstatements and inflammatory, dramatic, self-serving and exaggerated language in their moving papers of June 13,1973 in order to make it appear as if there actually was an obstruction of discovery by the defendants. For example, on page four (4) of Mr. Lawrence's affidavit of June 13, 1973 he refers to the interrogatories as remaining "largely unanswered ..". This statement is not only belied by the defendants having filed four separate sets of answers to the plaintiffs' interrogatories, but is contrary to the Magistrate's Report which found that only four specific items of the interrogatories were not adequately answered. A plain reading of all the answers to the interrogatories attests to the defendants' compliance with the discovery sought by the plaintiffs. It can hardly be said that where, as here, a party

submits four different sets of answers to interrogatories that it is "obstructing discovery".

Another misstatement is to be found on page four (4) of the aforesaid affidavit of Mr. Lawrence, wherein the statement is made that "Lengthy proceedings were conducted..before..

Magistrates in the course of which David I. Koegel clearly demonstrated a contumacious refusal to heed the numerous directions made by the Magistrates..". The plain fact is that Mr.

Koegel never appeared before any Magistrate, nor submitted any affidavit in connection with any of the pre-trial proceedings herein.

As can be seen by Mr. Koegel's affidavit, he attests to making every effort to provide his prior counsel with all information necessary for them to have prepared full and complete answers to the interrogatories. This is also noted in the aforesaid letter of Mr. Goldman to this Court dated July 18, 1973. In addition, I am informed by Mr. Stephen Drogan of Main, Lafrentz Co., the defendant Flora Mir's prior accountant, that numerous documents and information were furnished to defendants' prior attorneys by said accountants to enable them to answer the interrogatories. Mr. Koegel's affidavit further recites that he relied entirely on the judgment of his prior attorneys to respond to the interrogatories after having furnished them with all the information they requested.

It has been held that the striking of an answer and the entry of a default judgment for a defendant's failure to produce documents and/or appear and testify, was invalid because

there was no showing that the defendant had suppressed or failed to produce material evidence in his possession which he had been ordered to produce (see accompanying memorandum). It has like-wise been held that where a party's failure to respond is not predicated on wilfulness, disobedience, gross indifference, deliberate callousness or gross negligence, it was error for the trial court to use dismissal as the device for enforcing discovery (see accompanying memorandum).

Mr. Koegel also states in his affidavit that he desired to submit further answers along with this motion to the four items of interrogatories that he was directed to answer by this Court's Order of June 21,1973, but was unable to do so because his prior attorneys refused to release the information and documentation necessary to answer same which had previously been turned over to them. I have made repeated oral requests to defendants' prior counsel, as well as one written request dated August 28, 1973 -- a copy of which is annexed hereto as Exhibit "3" -- to either provide or allow access to the information contained in their files that would be necessary to comply with this Court's Order of June 21, 1973. All of these attempts have been to no avail to date. A companion motion to the instant one will be submitted shortly seeking to compel the defendants' prior counsel to turn over their files to either the defendants or our firm so that the defendants can comply with the Court's Order of June 21, 1973 and proceed forthwith with the defense of this action. The Supreme Court has held that under Rule 37(b), a trial court cannot enter a default judgment when a failure to obey an

order of the Court was caused by a party's inability to do so after a good faith effort at compliance.

It is respectfully submitted that there would be no reason for the defendants to withhold any information here from the plaintiffs, inasmuch as practically all the information sought here through the interrogatories is already part of the public record in the Chapter XI proceedings involving the defendant Flora Mir which took place prior to the commencement of this action.

- 5. Although wilfulness was deleted from Rule 37(d) in the 1970 amendments, it is a factor to be taken into consideration in determining the severity of the sanction chosen by the Court (see accompanying memorandum). It can hardly be contended that where, as here, defendants submitted four sets of answers to interrogatories and were never served with or informed of a Court Order directing answers to four specific interrogatories, that there had been a wilful failure to answer said interrogatories. It is noted that no finding was ever made here by the Court or Magistrate Goettel of "wilfulness" on the part of the defendants with regard to their answers to the interrogatories herein. Mr. Koegel on page 5 of his affidavit refers to that portion of Magistrate Goettel's Report which indicates that the Magistrate did not find any wilfulness on the part of the defendants. In view of there being no finding of "wilfulness" here on the part of the defendants, it would appear that the striking of the answer of the defendants is completely unwarranted.
  - 6. As can be seen by the accompanying memorandum, due

process is satisfied only if a delinquent party is given an opportunity to be heard before imposition of a sanction under Rule 37. It is apparent that such an opportunity was denied to the defendants here, as Mr. Goldman's letter to this Court of July 18, 1973 requested a hearing on the then pending motions, but none was afforded. I understand from Mr. Goldman that he also requested a hearing on the plaintiffs' motion at a conference which was held between all parties in the Court's Chambers on June 27, 1973. As Mr. Koegel indicates in his affidavit, he would be prepared to prove at such a hearing that he never suppressed or failed to produce any information in his control or possession which was called for by the interrogatories, and he was never served or made aware of this Court's Order of June 21, 1973 directing that further answers be furnished to four specific items of interrogatories.

The defendants are also entitled to a hearing on the costs that were taxed in connection with the pl-intiffs' motion to strike their answer under Rule 37. Under Rule 37(a)(4), the Court is empowered to require the party whose conduct necessitated a Rule 37 motion, to pay the reasonable expenses, including attorneys' fees, to the moving party only after an opportunity for a hearing. Although the Court's Order here of June 21, 1973 provides for the payment by the defendants to the plaintiffs of \$1,000.00, no opportunity for a hearing on the validity of the "plaintiffs' costs" was ever afforded or granted to the defendants. The accompanying memorandum also cites ample authority for the proposition that before expenses can be awarded, the

party in default is entitled to a hearing.

The Court is empowered under Rule 37(a)(4) to refuse to make an award for expenses if the circumstances make an award of expenses unjust. In view of Mr. Koegel never being served or being made award of the Court's Order of June 21, 1973, and in view of his sworn statement that he provided his prior counsel with all information necessary to fully and adequately respond to the interrogatories herein, it appears that the circumstances make an award of expenses in connection with the plaintiffs' motion unjust.

The relief sought by plaintiffs in their motion of June 13, 1973 cannot properly be granted. The plaintiffs' motion to strike the defendants' Answer pursuant to Rule 37(d) and 37b(2)(c) was premature in that there was no outstanding Court Order directing the defendants to answer any of the interrogatories herein at the time that the plaintiffs filed their motion to strike. The moving and supplemental affidavits of plaintiffs' counsel contained conflicting statements as to whether or not there was a prior Order directing defendants to answer interrogatories, to wit: On page two (2) of the Affidavit of Services of Harold B. Lawrence, Esq. filed on June 21,1973 in support of plaintiffs' motion to strike, Mr. Lawrence states that Magistrate Goettel "ordered" defendants to furnish responses to interrogatories. However, on page four (4) of Mr. Lawrence's Supplemental Affidavit in support of plaintiffs' motion, also filed on June 21, 1973, he states that Magistrate Goettel merely "recommended" that the defendants be ordered to answer on pain of dismissal.

Plaintiffs' motion of June 12, 1973 also sought to strike the answer of the defendants on the basis that Mr. Koegel failed to appear for a deposition on behalf of David I. Koegel Enterprises, which was subpoenaed as a witness. David I. Koegel Enterprises is not a party to this law suit. Further, Mr. Koegel was not subpoenaed for the deposition as an individual. It is absolutely clear from Rule 37(d) that the remedy provided therein for a wilful failure to appear applies only to parties, and not to witnesses. Therefore, plaintiffs are not entitled to the relief sought in their motion, since a party's answer cannot be stricken because of a witness' failure to appear for a deposition. Under Rule 37, if David I. Koegel Enterprises did not appear for a deposition, plaintiffs! remedy was to move to compel it to appear for such a deposition. A party cannot be punished for the failure of a third party to comply with orders, the redress for such a failure being imposition of a direct sanction

against the person who has refused to obey the order (see accompanying memorandum).

In any event, Mr. Koegel's affidavit recites that he was fully prepared to appear as a witness for the examination of David I. Koegel Enterprises, but did not attend on the instruction of his prior attorneys that the examination was being adjourned and that they would notify him when he would be needed in the future. Mr. Koegel further states that he never requested an adjournment or postponement of said deposition, nor did he ever refuse to appear for said deposition.

- 8. I note that although plaintiffs in their moving papers of June 12, 1973 place a great deal of emphasis on Mr. Koegel not being examined as a representative of a witness in June of 1973, the plaintiffs neglected to bring to the Court's attention that David I. Koegel Enterprises, Inc. was first noticed for a deposition on July 31, 1972, but apparently plaintiffs never bothered to proceed with the examination until June 1973, after serving another Notice to Take Deposition.
- 9. As can be seen by the defendants' Answer to the complaint, the four separate sets of answers to the interrogatories and Mr. Koegel's affidavit, the factual disputes here are extensive and vigorous and the defenses asserted by the defendants, if proved, are dispositive of the issues. In addition to Mr. Koegel's summary recital in his affidavit of some of the defenses here, several legal defenses also exist, among which are: (a) the action is barred by the applicable statutes of limitations, including Section 13 of the Securities Act of 1933;

- and (b) plaintiffs are guilty of laches in that they failed to take any action for over 3 1/2 years after they knew of the mis-representations alleged in the complaint.
- 10. Is is respectfully submitted that in view of the submission by the defendants of their Answer to the complaint, four sets of Answers to interrogatories and other extensive pretrial discovery having already taken place in this case, it would be a grave injustice to permit a default judgment to be entered against the defendants.
- of other extraordinary circumstances here likewise merit the defendants being relieved from the order directing entry of judgment against them. They are: (a) The coincidence of defendants' prior counsel moving to withdraw from the case on the same day as plaintiffs moved to strike the defendants' answer; (b) Defendants' counsel being permitted to withdraw from the case during the pendency of a motion to strike that involved matters which occurred during their stewardship of the defense; (c) Defendants not being represented by counsel at the time of the granting of plaintiffs' motion; and (d) Defendants never having been served nor made aware by their prior counsel of a court order directing a further response to four interrogatories.
- 12. There are substantial sums of money involved in this action, to wit, in excess of \$800,000.00 according to the complaint. As can be seen by the accompanying memorandum, the Courts of Appeal have declared that matters involving large sums of money should not be determined by default judgments.

- 13. It is respectfully submitted that there will be no prejudice to the plaintiffs by relieving the defendants from the order providing for a default judgment and allowing the defendants to continue to defend this suit on the merits.
- 14. It is submitted that the striking of the defendants' answer is a drastic and final remedy which is wholly unwarranted under all of the surrounding circumstances here. The defendants have been and will continue to vigorously defend this suit on the merits if permitted to do so by the Court.
- 15. No prior application has been made for the relief sought herein.

WHEREFORE, your deponent respectfully requests that the defendants' motion seeking to vacate an Order striking the answer of the defendants and providing for the entry of a default judgment be granted in all respects.

/s/ Lawrence G. Soicher
LAWRENCE G. SOICHER

Sworn to before me this

12th day of September, 1973.

/s/ Eli Uncyk

ELI UNCYK
NOTARY PUBLIC, State of New York
No. 31-4502581
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK UNITED STATES COURT HOUSE NEW YORK, N. Y. 10007

CHAMBERS OF JUDGE MORRIS E. LASKER

June 28th, 1973

David I. Koegel, Esq. c/o Hotel Kenmore 145 East 23rd Street New York, New York

Steven Flaks, et al v. David I. Koegel and Flora Mir Candy Corporation 72 Civ. 1901 MEL

Dear Mr. Koegel:

There are pending before me two motions in the above case which directly affect you personally.

- 1. A motion to strike your answer (and that of Flora Mir Candy Corporation) by the plaintiffs and render default judgment against you by reason of your and its wilful and deliberate obstruction of discovery in this case.
- 2. A motion by your attorney, Arthur S. Olick, Esq., of Kreindler, Relkin, Olick & Goldberg, Esqs., to withdraw as your attorney and attorney for Flora Mir Candy Corporation.

Yesterday afternoon I met with Messrs. Olick, Lawrence and Goldman to discuss the situation. Mr. Goldman reported to me that he appeared on your behalf although he has not been retained to appear for you in this action.

As a result of the discussion, I am instructing you as follows:

- 1. I have deferred until July 27, 1973, the return date of the motion to strike the defendants' answers and for a default judgment. I have done this bearing in mind that you will be abroad between June 29th and July 17th.
- 2. Having been advised by Mr. Goldman that you wish to put facts before me in connection with Mr. Olick's motion to withdraw as defense counsel, you may have until the close of business July 20, 1973 to submit an affidavit in relation to that motion.
- 3. Barring strong evidence contained in any affidavit you submit, I shall grant Mr. Olick's motion to withdraw as counsel.
- 4. On the assumption that there is a strong possibility I will grant Mr. Olick's motion, you are to take all steps necessary to retain counsel to defend you as to the motion to strike your defenses and for a default judgment.
- 5. I will be prepared forthwith after July 27, 1973, to determine plaintiffs' motion to strike your answer for failure to respond to interrogatories regardless of whether any attorney has appeared on your behalf.
- 6. Any attorney whom you retain to replace Mr. Olick is to be advised by you that he must be prepared to proceed

forthwith with all matters pending in this case.

Very truly yours,

/s/ Morris E. Lasker

MEL/cw

David I. Koegel, Esq. cc:

Stratford Road Harrison, New York

Harold B. Lawrence, Esq. Arthur S. Olick, Esq. Jerome E. Goldman, Esq.

EXHIBIT "2"

JEROME E. GOLDMAN ATTORNEY AT LAW

401 BROADWAY NEW YORK, N.Y. 10013

212-925-2105 431-4150

July 19, 1973

Hon. Morris E. Lasker United States Courthouse Foley Square, New York

> Re: Flacks v. Koegel 72 C 1901

Dear Judge Lasker:

I am writing you on behalf of David I. Koegel concerning the motion by Mr. Olick to withdraw as the attorney of record herein.

When I appeared in your office on June 27th, 1973, I indicated that I had not discussed this matter in detail with Mr. Koegel and that he would be out of the country until July 17th. Mr. Koegel in fact returned on the 17th, and we spent the entire afternoon reviewing his case. It appears that if Mr. Olick's firm is permitted to withdraw at this time and Mr. Koegel is required to comply with your direction as set forth in your letter of June 28th, his rights in this action will be highly prejudiced for the following reasons:

(1) According to Mr. Koegel, all the information required to be answered in plaintiff's interrogatories were in fact given to a Mr. Lawrence of Mr. Olick's firm quite some time ago.

His Honor may recall that Flora-Mir Candy Corporation, the other defendant, was in Chapter XI and most, if not all, the information sought in plaintiff's interrogatories was a matter of record in those proceedings. Furthermore, Mr. Koegel advises me that on numerous occasions he was ready, willing and able to appear for examinations before trial, but at the last moment was notified that it was being adjourned by counsel. On other occasions he was notified of scheduled examinations a day before and was either out of town or unable to appear due to prior commitments. There were other matters for which Mr. Koegel was not entirely at fault, but for which he is being charged in plaintiff's motion papers.

(2) Mr. Koegel had agreed on a monthly retainer with Mr. Olick for representation in this matter and for which he has abided by throughout the litigation. Due to the financial situation of Mr. Koegel, he is presently unable to retain proper counsel on such short notice.

Mr. Koegel has further indicated that he is ready, willing and able to provide whatever information that plaintiff seeks, if in fact such information is available.

Under these circumstances, it is respectfully requested that His Honor set a hearing for this motion so that Mr. Koegel may testify and prove by documentary evidence all that outlined above. Although Mr. Koegel is aware that the court will grant Mr. Olick's motion and permit him to withdraw, it must be

determined under what conditions the withdrawal will be permitted. Also, if it is determined that the acts set forth in plaintiff's motion were not solely caused by Mr. Koegel, then a further extension of time be permitted to retain new counsel.

Respectfully yours,

/s/ Jerome E. Goldman

JEROME E. GOLDMAN

JEG: fed

CC: Kreindler, Relkin, Olick & Goldberg, Esqs.
Arthur S. Olick, Esq.
500 5th Avenue
New York, New York 10036

August 28, 1973

Arthur S. Olick, Esq. Kreindler, Relkin, Olick & Goldberg 500 Fifth Avenue New York, New York 10036

> Re: Flaks v. Koegel and Flora Mir Candy Corp. 72 Civ. 1901

Dear Mr. Olick:

This will confirm our repeated requests on behalf of the defendants in the captioned matter, for you to turn over your files in this case -- either in whole or part -- to us. As you know, Mr. Koegel who was your former client in this matter, has formally retained us to defend him and his corporation in this pending action. Mr. Koegel informs us that he has turned over to your firm all documents, records and information pertaining to this case. It is therefore impossible to proceed with the defense of this action without the information contained in your files.

As I informed you over the telephone, Judge Lasker has signed an order directing entry of a judgment against the defendants for the sums demanded in the complaint. Accordingly, it is imperative that we obtain your cooperation in furnishing us with the information I requested, so that the defendants can obtain relief from said judgment.

I understand from our conversation, that you are refusing to furnish us with any information from your files that would be necessary in order for us to take any meaningful and proper action to protect the interests of the defendants at this critical juncture. I note that I spoke with you twice on August 24 at some length, as well as previously, in the hope that our firm could at least obtain <u>some</u> access to these files, even if to the extent of only furnishing us with enough information (documents, exhibits, etc.) that would be necessary to obtain relief from the default judgment, and interpose answering papers to the plaintiff's motion to strike the defendants' answer dated June 13, 1973. Specifically, we need the information in order to answer Items 20(a), (b), and (c), 38, 45(b) and 66(b) of the plaintiff's interrogatories.

You will recall that I pointed out to you that it is to your interests -- as well as ours -- to either furnish us with information from your files or permit us some form of limited access to them, inasmuch as if the default judgment is allowed to stand, there would be no possibility of your obtaining any fee at all, assuming one is properly due and owing to you.

Aside from Mr. Koegel disputing your time charges on this case, which you are already aware of, he is not in a position presently to effect any kind of a settlement of your fees which would require a cash outlay. In view of Mr. Koegel's stated current financial plight, it would serve no useful purpose for you to continue to refuse to furnish us with the information that we so urgently need in order to demonstrate to the court

that there are meritorious defenses to this action and to comply with the court's order of June 21, 1973 to answer the aforementioned four items of the plaintiff's interrogatories. [Mr. Koegel was never served with said order, nor was he ever aware of same until I brought it to his attention just recently after seeing it in the court file]. We can never hope to show the court the defendants' good faith and willingness to comply with court directives and the Federal Rules of Civil Procedure without your cooperation in this regard.

You will recall that I offered to sign any document, should you decide to release the files to us, that would acknowledge your lien and state that by your "lending" us your files you would not be waiving or relinquishing your lien on them thereby. You will recall that I stated to you that Judge Lasker's Law Clerk informed me that the Judge would be away on vacation until some time after Labor Day. Therefore, it would probably be to little avail for us to apply to the court for an order directing you to turn over your files to us, inasmuch as said application could not be acted upon until the Judge returned.

In the meantime, your failure to furnish us with the information I requested would severely prejudice the defendants, in that it would limit the information that should be brought to the attention of the court in seeking relief from the default judgment, and would delay the making of such an application.

The need for your cooperation is further heightened by

the fact that the Clerk's Office, as of this morning, was unable to locate the court file. Consequently, we were unable to xerox the file as we had intended.

I again renew our request for your cooperation in allowing us access to your files on this case. If upon further reflection you change your mind, please call me immediately at 371-5400.

Very truly yours,

Lawrence G. Soicher

LGS:lr Certified Mail - R.R.R. STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and : MILTON WEINGER,

72 Civ. 1901 (MEL)

AFFIDAVIT

:

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

ss.:

STATE OF NEW YORK )

COUNTY OF NEW YORK )

DAVID I. KOEGEL, being duly sworn, deposes and says that:

- 1. I submit this affidavit in support of the defendants' motion seeking relief from an Order of this Court dated August 22, 1973, providing for striking the Answer of the defendants and the entry of a default Judgment in accordance with the sums demanded in the Complaint, on the grounds that all of the surrounding circumstances -- including excusable neglect -- justify relief from the Order in the furtherance of justice.
- 2. My failure to respond to the plaintiffs' Motion of June 14, 1973 to strike the Answer of the defendants was due directly to the inability to retain new counsel in the period of time allowed by the Court. I did not ignore the Court's warning,

An additional reason why I could not obtain new counsel sooner than I did was that during the period of July 17, 1973 to

August 2, 1973 I was away from New York City for twelve (12) days operating my business in North Carolina as follows: July 17th through July 19th, July 23rd through July 27th and July 30th through August 2nd. As President of Flora Mir, my presence is required in North Carolina for approximately two to five days of each business week. Also, during the period when I was attempting to obtain new counsel I was informed by Mr. Goldman that he was in daily contact with this Court's Chambers in order to report on the attempts being made to obtain new counsel and to request additional time in order to secure new counsel. I note that in a letter dated July 18, 1973 Mr. Goldman informs the Court of the problems that were being encountered with regard to obtaining new counsel and requested additional time to obtain same. Annexed hereto as Exhibit "A" is a copy of said letter.

Still another reason for being unable to obtain new counsel within the brief time allotted was due to my financial situation. Mr. Goldman s letter of July 18, 1973 points this out to the Court. I respectfully submit that I should not be deprived of good and meritorious defenses to this action because of a lack of substantial funds -- needed for the defense of a case of this type -- which, among other reasons detailed above, had prevented me from securing new counsel any sooner than I did in August, 1973.

3. The failure to comply with this Court's Order of June 21, 1973, directing the defendants to further answer Items numbered 20(a), (b), and (c), 38, 45(b) and 66(b) of the Interrogatories, was due to the fact that I was never served or made

aware of said Order until my new counsel brought it to my attention only recently after reviewing the Court file on this case.

I note that in the Court's letter to me dated June 28, 1973, no mention was ever made of this June 21, 1973 Order.

At no time did my prior attorneys ever inform me of the existence of such an Order, although they were still representing me at the time the Order was issued. (Their Motion to withdraw as counsel for the defendants was not granted until July 26, 1973). It is apparent that for all intents and purposes my prior attorneys abandoned this case after moving to withdraw on June 12, 1973, as they did not inform me of either the Court's Order of June 21, 1973 or the contents of the Supplemental Affidavit of Harold B. Lawrence, attorney for the plaintiffs, filed on June 21, 1973 which is referred to by the Court in its decision of August 2, 1973 granting plaintiffs' motion.

4. I have previously made every good faith effort to provide my prior attorneys with all information necessary for them to prepare full and complete Answers to the Interrogatories served by the plaintiffs. I obtained information and all types of documentation for my prior attorneys from my business and personal files, as well as the accountants for Flora Mir, Main, Lafrentz & Co. My accountants also furnished my former attorneys directly with substantial information and documentation. In addition, I directed my prior attorneys to places where certain information that I did not have in my possession could be obtained.

My former attorneys had access to all my business files and indeed on more than one occasion extracted all the information

and documentation they desired to respond to the Interrogatories. I have continually made information available to them as can be seen by the four separate sets of Answers to the Interrogatories which were filed on January 26, 1973, March 20, 1973, May 10, 1973 and May 14, 1973, respectively. The "Answers to Interrogatories", filed on January 26, 1973, consisted of 70 pages plus numerous exhibits; the "Supplemental and Amended Answers to Plaintiffs' Interrogatories", filed on March 20, 1973, consisted of 18 pages and numerous exhibits; the "Supplemental Answers to Plaintiffs' Interrogatories", filed on May 10, 1973, consisted of 3 pages and exhibits; and the "Supplemental Answers No. 2 to the Plaintiffs' Interrogatories", filed on May 14, 1973, consisted of 4 pages and exhibits. My present attorneys inform me that almost the entire bulk of the Court file consists of the Defendants' Answers to the Plaintiffs' Interrogatories. If nothing else, the sheer bulk of these Answers attests to the fact that every effort was made to provide full responses to the Interrogatories as best as possible. This is also borne out by the fact that this Court and Magistrate Goettel, in his Report and Recommendation dated May 22, 1973, found that only 4 Interrogatories out of 130 separately numbered Interrogatories propounded to each defendant were not adequately answered by the defendants. It is to be noted that most of the 130 Interrogatories contained numerous subquestions which when totalled amount to approximately 1,000 questions in all.

My present attorneys inform me that Magistrate Goettel's Report found that I did not wilfully evade answering these four

(4) questions as the Magistrate stated on page 2 of his Report, that "Should depositions (or other discovery) establish that the defendants' failure to obtain the records and supply responsive Answers to the Interrogatories has been wilful, the conduct of the defendants can be dealt with at that time."

the aforementioned four Items of Interrogatories, the responsibility for same lies with my prior attorneys who were provided with all of the information required to answer same fully and adequately. After furnishing my previous attorneys with all of the information they requested, I relied entirely on their judgment in responding to the Interrogatories and to handle all legalities with reference to same. In this regard, I am informed that Magistrate Goettel's Report states that my prior counsel waived the objections they had previously asserted to Items numbered 45(b) and 66(b) of the Interrogatories by not pressing or arguing them in their papers opposing the plaintiffs' January 4, 1973 Motion to Strike the Answer of the Defendants.

In furtherance of my desire to comply in every respect with this Court's Order of June 21, 1973, I fully intended to submit Answers to the four Items of Interrogatories covered by said Order along with this Motion, but was unable to do so because my prior attorneys refused to release the information in their possesion, which is necessary to answer said four Interrogatories, to my present attorneys. I affirm that all information necessary to answer these four Interrogatories completely had previously been turned over to my former lawyers. For

example, with regard to Items 20(a), (b), and (c), and 38, that I was directed to answer by this Court's Order of June 21, 1973, I gave my prior attorneys a 100-page Bankruptcy Report which contained all of the details of the indebtedness of the defendant, Flora Mir Candy Corporation (hereinafter "Flora Mir") to David I. Koegel Enterprises, Inc. (hereinafter "Enterprises"). I also rutned [sic] over to my prior attorneys all books and records of Flora Mir which pertain to any transactions had with Enterprises. The aforementioned would have and should have enabled my prior counsel to respond fully to the aforesaid Items of Interrogatories long ago. My prior attorneys also have the original of the promissory notes and/or bonds which comprise the indebtedness of Flora Mir to Enterprises which likewise would have enabled them to provide full responses to the aforementioned four Items of Interrogatories long ago.

My present attorneys have made repeated oral requests, as well as one in writing, since being retained in August 1973, for my former attorneys to either provide or allow access to the information contained in their files which is necessary to obtain in order to comply with this Court's Order of June 21, 1973. All of these attempts to obtain the information from my prior attorneys have been to no avail to date. I understand my present attorneys are submitting a companion motion to compel my prior attorneys to turn over their files on this matter, so that I can obtain the information with which to comply with this Court's Order, as well as conduct the defense of this suit.

My prior attorneys refuse to release the information

102a which is necessary to comply with this Court's Order because of a dispute I have with them over fees and their prior handling of this case. While this is not the proper time to air this dispute, suffice it to say that contrary to the impression given to this Court that little, if any, monies was paid to my prior attorneys, I have in fact paid a substantial sum to date to my former attorneys for the "handling" of this case and other cases I turned over to them to prosecute claims on my behalf. I had agreed on a monthly retainer against time charges with Mr. Olick, my prior attorney, for representation in this matter. Up until the time my prior counsel moved to withdraw here I had abided by our agreement by making monthly payments of \$1,500 to my prior counsel. Also, contrary to the impression sought to be conveyed to this Court by the plaintiffs, I have cooperated fully with my prior attorneys. Our relationship began to deteriorate only after I questioned their accumulated time charges on this case and the progress of the matters that I turned over to them relating to claims by myself against others. I also had protested to them the "eleventh hour" last-minute, crises-type of submission of Answers to the Interrogatories that had occurred on two or three occasions. If there was a pattern of a lack of cooperation on my part here, my prior counsel certainly would not have waited so long to withdraw from the case.

5. If there is any doubt about the circumstances surrounding the alleged deficiencies in the Answers to the aforesaid four Items of Answers to Interrogatories, I respectfully
request a hearing to prove that any such deficiency was not

caused through any fault of mine. At such a hearing I would be prepared to prove that (a) I never suppressed or failed to produce any information in my dominion, control or possession which was called for by the Interrogatories, and (b) I was never served or made aware of the June 21, 1973 Court Order directing that Answers be furnished to four specific Items of Interrogatories.

6. With respect to the oral deposition of which Enterprises was subpoensed to appear as a witness, after being served with a subpoens I was prepared to attend such deposition on behalf of Enterprises on the date originally scheduled in the subpoens, but was told by my prior attorneys that it was being adjourned because my wife, Lorna Koegel, was going to be examined first and they would let me know when I was needed in the future. I was never notified to appear on any subsequent date.

I state unequivocally that I never requested my previous attorneys to seek any adjournment or postponement of the deposition of Enterprises as scheduled in the subpoena issued to me, nor did I ever refuse to appear for said deposition. In any event, I stand ready now, as I have always been, to submit to such an examination.

Although plaintiffs in their moving papers of June 14, 1973 place great emphasis upon the examination of Enterprises not being conducted on the adjourned date in June 1973, plaintiffs neglected to inform the Court that when they first noticed Enterprises for deposition on <u>July 31, 1972</u>, they never bothered to take the examination at that time or sought to take it subsequently until May 15, 1973. Annexed hereto as Exhibit "B" is a

copy of the notice to take the deposition of Enterprises on 104a
July 31, 1972.

- 7. As can be seen by a copy of the Answer herein, both I and the corporate defendant have good and meritorious defenses to this action. Time and circumstances here (refusal of prior counsel to release files on this case) do not permit a detailed recitation of each and every defense to the claims asserted against the defendants. However, suffice it to state that:
- (a) No representations were ever made to the plaintiffs in connection with the sale of the subject debentures except those contained in the purchase agreement of September 6, 1968 which was signed by each of the plaintiffs herein.
- (b) Said purchase agreement expressly recites that each of the plaintiffs acknowledge that they were not induced to purchase the bonds by any information, representation, or other statement not contained in the purchase agreement.
- (c) The representations set forth in said purchase agreement were true and accurate, and I had reasonable grounds to believe that the representations contained in said agreement were true and accurate when made.
- (d) The sale of the subject bonds was not made pursuant to any public offering. It was a private placement only.

  No registration with the Securities and Exchange Commission was necessary since the sale of the bonds was exempt from registration under Section 4(2) of the Securities Act of 1933. Each of the plaintiffs signed documents attesting to their compliance with the Securities Laws applicable to private placements and

were aware that the sale of the bonds was exempt from registration.

- (e) The plaintiffs are and were experienced and sophisticated business people who were connected with Wall Street-type investment firms. Each plaintiff was represented by counsel upon the signing and closing of the aforesaid bond purchase agreement. Each plaintiff signed a statement to the effect that they were sophisticated, experienced investors and were aware that the sale of the bonds was made pursuant to a private placement.
- agreement by furnishing the plaintiffs with the financial statements required by said agreement. Pursuant to the purchase agreement, the plaintiffs had a certain time within which they could demand their money back for the purchase of the bonds if they were not satisfied with the information contained in the financial statement which were provided to them. The agreement further provided that if the defendants were not able to return the purchase price of the bonds to the plaintiffs upon their demand, the plaintiffs could then take control of Flora Mir. Although plaintiffs were furnished with the financial statements required by the agreement and had ample opportunity to review same, they never saw fit at any time to exercise their right to rescind their purchases of the bonds.
- (g) Defendants never discussed the purchase of the subject bonds with any of the plaintiffs. Defendants never met with any of the plaintiffs to discuss the purchase of the subject bonds. The plaintiffs were represented by Messrs. Graff and

Newmark in connection with their purchase of the bonds. Both of these men signed statements indicating that they understood that the issuance of these bonds by Flora Mir was pursuant to a private placement and that they did not offer to sell the bonds to more than three persons other than the group of purchasers herein. Messrs. Graff and Newmark organized the plaintiffs as a group in order to purchase the bonds.

- (h) The same claims alleged in this suit were raised by Messrs. Graff and Newmark as defenses in a suit by myself against them in New York Supreme Court. That case was decided against both Messrs. Graff and Newmark.
- (i) I had been informed by my previous lawyers that depositions taken by them of the plaintiffs indicate that there is no merit at all to the plaintiffs' contentions here. The transcripts of said depositions are in my prior lawyers' files and consequently, I am unable to annex copies hereto, since they steadfastly refuse to release these files.
- (j) Some of the same contentions made in this suit were previously made by the plaintiffs and resolved against them in reorganization proceedings involving Flora Mir. The claims involved here were raised in the Bankruptcy Court by plaintiffs in connection with their opposing a settlement with Flora Mir whereby Flora Mir disaffirmed the plaintiff-bondholders' right to convert their bonds into the common stock of Flora Mir. This suit was commenced by plaintiffs only after they were defeated by the defendants in litigation before Referee Babbitt, Judge Lasker and the Second Circuit United States Court of Appeals, wherein

Flora Mir's right to disaffirm the plaintiffs' attempted conversion of their bonds into common stock was upheld by said Courts.

- 8. I repeat most emphatically that I stand ready as I always have in the past to abide by the letter and spirit of the discovery rules, as well as of any Court directive issued in connection with this case.
- 9. I respectfully submit that under all of the circumstances present here, it would be a grave injustice not to relieve the defendants from the Order of this Court dated August 22, 1973 directing the entry of a default judgment, in that it would precide [sic] the defendants from asserting and proving their defenses in a trial on the merits.

WHEREFORE, your deponent respectfully requests that the defendants' Motion seeking relief from an Order striking the Answer of the defendants and providing for the entry of a default judgment be granted in all respects.

/s/ David I. Koegel
DAVID I. KOEGEL

Sworn to before me this

10th day of September, 1973.

/s/ Jeffrey H. Schneider

JEFFREY H. SCHNEIDER
NOTARY PUBLIC, STATE OF NEW YORK
No. 93-03-8831125
Qualified in Kings County
Commission expires March 31, 1975

EXHIBIT "A"

JEROME E. GOLDMAN ATTORNEY AT LAW

> 401 BROADWAY NEW YORK, N.Y. 10013

212-923-2105 431-4150

July 10, 1973

Hon. Morris E. Lasker United States Courthouse Foley Square, New York

> Re: Flacks v. Koegel 72 C 1901

Dear Judge Lasker:

I am writing you on behalf of David I. Koegel concerning the motion by Mr. Olick to withdraw as the attorney of record herein.

When I appeared in your office on June 27th, 1973, I indicated that I had not discussed this matter in detail with Mr. Koegel and that he would be out of the country until July 17th. Mr. Koegel in fact returned on the 17th, and we spent the entire afternoon reviewing his case. It appears that if Mr. Olick's firm is permitted to withdraw at this time and Mr. Koegel is required to comply with your direction as set forth in your letter of June 28th, his rights in this action will be highly prejudiced for the following reasons:

(1) According to Mr. Koegel, all the information required to be answered in plaintiff's interrogatories were in fact

given to a Mr. Lawrence of Mr. Olick's firm quite some time ago. His Honor may recall that Flora-Mir Candy Corporation, the other defendant, was in Chapter XI and most, if not all, the information sought in plaintiff's interrogatories was a matter of record in those proceedings. Furthermore, Mr. Koegel advises me that on numerous occasions he was ready, willing and able to appear for examinations before trial, but at the last moment was notified that it was being adjourned by counsel. On other occasions he was notified of scheduled examinations a day before and was either out of town or unable to appear due to prior commitments. There were other matters for which Mr. Koegel was not entirely at fault, but for which he is being charged in plaintiff's motion papers.

(2) Mr. Koegel had agreed on a monthly retainer with Mr. Olick for representation in this matter and for which he has abided by throughout the litigation. Due to the financial situation of Mr. Koegel, he is presently unable to retain proper counsel on such short notice.

Mr. Koegel has further indicated taht he is ready, willing and able to provide whatever information that plaintiff seeks, if in fact such information is available.

Under these circumstances, it is respectfully requested that His Honor set a hearing for this motion so that Mr. Koegel may testify and prove by documentary evidence all that outlined above. Although Mr. Koegel is aware that the court will grant

Mr. Olick's motion and permit him to withdraw, it must be determined under what conditions the withdrawal will be permitted.

Also, if it is determined that the acts set forth in plaintiff's motion were not solely caused by Mr. Koegel, then a further extension of time be permitted to retain new counsel.

Respectfully yours,
/s/ Jerome E. Goldman

JEROME E. GOLDMAN

JEG: fed

cc: Kreindler, Relkin, Olick & Goldberg, Esqs. Arthur S. Olick, Esq. 500 5th Avenue New York, New York 10036 NOTICE TO TAKE DEPOSITION OF DAVID KOEGEL ENTERPRISES, INC.

OMITTED

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

- x

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

Plaintiffs,

72 Civ. 1901 (MEL)

AFFIDAVIT IN OPPOSITION TO MOTION TO VACATE ORDER

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION.

Defendants.

- X

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

Deponent is an attorney at law associated with SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN, attorneys for the plaintiffs in this action, and is familiar with all the facts and circumstances hereof.

Deponent submits this affidavit in opposition to the belated motion of the defendants for an order vacating the order of this Court, dated August 22, 1973, striking the answer of the defendants.

The defendants hope to escape their liabilities in this action by throwing a veil of secrecy over their operations and by the simple process of wearing down the plaintiffs' attorneys and discouraging continued prosecution of this action. This motion is a part of that strategy. They attempt to per-

suade the Court to allow such tactics by a vicious assault upon the integrity of their prior counsel.

The defendants submit two lengthy affidavits, one by newly retained counsel and one by DAVID I. KOEGEL. These affidavits boil down to a contention that KOEGEL did, in fact, furnish all the requisite information, to his attorneys, and all of the delays and obstructions of the past fourteen months are their responsibility. MR. KOEGEL asserts that he attempted to cooperate in good faith, and that if he is now given another chance, he will prove himself to be a paragon of cooperation. The present application is typical of KEOGEL'S Fabian tactics. Each procedure in this action is permitted to proceed to its ultimate point, whereupon KOEGEL, through counsel, takes steps to reverse the procedure back to its beginning. Thus, every step in this action is repeated several times, in its entirety. KOEGEL exploits each and every possibility for delay which may exist in every procedure involved in the present litigation. It is characteristic that in the present instance, though a copy of the proposed order dated August 22, 1973, was served in advance upon MR. KOEGEL, no action was taken in response thereto until the threat of a judgment became apparent. The mere retention of a new counsel for the defendant is no reason to believe that the conduct of the defendant will improve.

In this case, as the Court is well aware, so many motions had to be made with respect to the responses to the interrogatories that Magistrate GOETTEL recommended that plaintiff's counsel be awarded the sum of \$1,000 to cover time

spent on the motions.

Substartially, the present motion poses two questions:

- (1) Was the conduct of the defendants such as to justify the sanctions imposed?
- (2) Is there any injustice in denying defendants another chance to contest the action?

## DEFENDANT'S CONDUCT AMPLY JUSTIFIED THE SANCTIONS IMPOSED

A complete review of the proceedings up to this point is not necessary, as the Court made its order of August 22, 1973, after consideration of those circumstances and Magistrate GOETTEL'S report. If the matters now urged upon the Court had been brought to the Court's attention before the date of the order, would the Court have proceeded differently? Deponent respectfully submits that the result would have been the same and that no sound reason is now presented for vacating the order.

Magistrate GOETTEL'S report and the order, based on the several hearings and voluminous paper work which weigh down the file in this matter, constitute a full answer to the first question. Over a 14 month period the defendant has obstructed discovery in this action by every means conceivable. His argument, to the effect that service of four sets of responses to the interrogatories, demonstrates a good-faith attempt to comply with those interrogatories, is an insult to the Court. The successive sets of responses were served under pressure from the Court on applications made by deponent to remedy deficiencies

in responses previously served.

All of the delays in this action are traceable to the conduct of the defendants, not their attorneys. Notwithstanding the statements made by KOEGEL and his new counsel, the fact remains that the former counsel, not MR. KOEGEL, initiated the proceedings for their withdrawal from this case. They based their application specifically on the ground of their inability to obtain proper cooperation from their client, and they stated flatly in their application to this Court that their client had failed to furnish requisite information.

The contention that defendants were unable to bring on this motion because they were prevented from doing so by difficulty in retaining new attorneys may be summarily dismissed for the simple reason that MR. KOEGEL had an attorney on the scene, JEROME E. GOLDMAN, who is stated to have been in constant communication with this Court, requesting additional time, to interpose affidavits. He could easily have brought on the present application.

The untrustworthiness of KOEGEL'S assurances of future good behavior is obvious. In his affidavit of September 10, 1973, he resorts to specious arguments, such as that the examination of DAVID I. KOEGEL ENTERPRISES, INC. had been scheduled on a prior occasion but not conducted, a fact which has nothing to do with the issues now before this Court. Another such tactic is the attempt to mislead the Court into believing that information was furnished in all of the interrogatories except items 20(a)-(c), 38, 45(b) and 66(b). As will be seen below,

no information has been furnished in response to items 14(c), 14(d), 15(d), 18, 38, 46, 53, 64, 67, 73, 74, 78, 85, 87(d), 87(e), 88, 94, 102 and 115.

The plain fact of this matter is that KOEGEL is now trying to lie his way out of the consequences of his deliberate obstruction of this lawsuit. He has been caught lying before and it will now be demonstrated that he is lying in his affidavit of September 10, 1973. The facts set forth below will demonstrate both the previous obstruction and the falsity of the statements and assurances given by KEOGEL in his affidavit of September 10, 1973. They show that KEOGEL'S failure to respond was deliberate.

1. The defendants made contradictory responses with reference to matters of vital significance. In the responses made on behalf of DAVID I. KOEGEL and on behalf of FLORA MIR CANDY CORPORATION to the separate interrogatories directed to the defendants, and in particular, items 20 and 38, the defendants variously stated that the indebtedness of FLORA MIR CANDY CORPORATION to DAVID I. KOEGEL ENTERPRISES, INC. was evidenced by a debenture and by a series of notes. Furthermore, inconsistent statements were made respecting their terms and provisions.

Items 20(a), (b) and (c) relate to a preceding interrogatory, No. 19, which inquired whether FLORA MIR at any time was indebted to DAVID I. KOEGEL ENTERPRISES, INC. This was answered affirmatively. Item 20 requested information as to the date such indebtedness was incurred; the details of the

obligations relating to face amount, date of maturity, the interest rate and convertibility; and the consideration for the said indebtedness.

The response originally furnished to items 20(a), (b) and (c), in the responses to interrogatories dated January 23, 1973, and sworn to by DAVID I. KOEGEL on January 26, 1973, were to the effect (a) the date of issuance was currently unknown to the defendants but would be provided as soon as obtained; (b) the terms of said debenture were the same as the terms of the debentures purchased by the plaintiffs; (c) the consideration was cash loans to FLORA MIR totaling \$192,500.00. In the supplemental and amended answers to plaintiff's interrogatories dated March 15, 1973, and sworn to by DAVID I. KOEGEL on March 15, 1973, the following responses were made: (a) the advances had been made between June 30, 1964 and May 31, 1968; (b) the lenders received for them non-convertible, demand notes at 8% interest, unsecured, totaling in the amount of \$192,500.00; (c) the consideration was cash loans.

The defendants wholly failed to supply requested information regarding the various dates upon which advances were made and FLORA MIR thereby became indebted to DAVID I. KOEGEL ENTERPRISES, INC.; the amounts of the particular loans made on the particular dates; the nature of the documents evidencing the indebtedness; the terms of the loans.

Item 20 is directly related to Item 38. Item 38 relates to a preceding item which asks whether DAVID I. KOEGEL ENTERPRISES, INC. held any promissory note or notes or other

evidence of indebtedness made by FLORA MIR and/or any other corporation named in the interrogatories. The response furnished originally, dated January 23, 1973, and sworn to January 26, 1973, stated that there are no notes, only a debenture, and furnished no further information. The supplementary responses did not respond to Item 38 at all. The supplemental answers No. 2 simply state "See Exhibit A annexed hereto and incorporated herein".

If Exhibit A is a truthful response to Item 38, then it contradicts the answer furnished to Item 20. In the supplemental and amended answers, dated March 15, 1973, the following response was given to Item 20(b): "Non-convertible, demand notes at 8% interest unsecured totaling in the amount of \$192,500." Furthermore, Exhibit A was a blank form of the subordinated debenture issued October 25, 1968. No payee is named therein. It was not the document issued to KOEGEL.

It was obvious that Exhibit A was a blank form of debenture or, worse, that it is a form of debenture which was issued to another payee whose name has been deleted. The photocopy furnished obviously had something superimposed upon it in order to delet the name of the payee. Deponent's request for inspection of this original document was refused with advice that the same has not been furnished by defendants to their counsel. The authenticity of this exhibit is in serious doubt.

2. The defendants never explained the reason for the absence of books and records. Such records were available throughout the Chapter 11 proceedings and were turned over to

the debtor at the conclusion of such proceedings in 1971 by order of Referee Babitt. The books and records had been in sufficiently good condition to enable the debtor, during the pendency of the Chapter 11 proceedings, to take a number of important actions which could not otherwise have been taken. These included the filing of its original petition under Section 322 of the Banktuptcy Act, which petition was accompanied by schedules of its liabilities; the filing of amended schedules thereafter; the making of various motions with respect to liens against property of the debtor or its subsidiary corporations; the making of motions to expunge claims; the passing on the validity of the numerous claims presented with respect to FLORA MIR CANDY CORPOR-ATION and its twelve subsidiaries, including those filed by all unsecured creditors, taxing authorities and union funds; and the making of motions with respect to the intercorporate accounts of FLORA MIR CANDY COFPURATION and its subsidiaries.

Despite KOEGEL's plea that records were not available, an excuse he made throughout the pendency of this action, during the pendency of the Chapter 11 proceedings, there had been no difficulty in finding records available to enable MR. KOEGEL

- (a) to file claims for the principal amount of the indebtedness owed to him and to DAVID I. KOEGEL ENTERPRISES, INC.;
- (b) to file claims for interest on the principal indebtedness;
- (c) to make assignments of claims purportedly existing in favor of DAVID I. KOEGEL ENTER-

PRISES, INC. against FLORA MIR CANDY CORPORATION, which claims were assigned to a number
of persons who then filed claims thereon
against FLORA MIR CANDY CORPORATION in the
Chapter 11 proceeding.

- 3. KOEGEL has furnished responses which are at variance with allegations made in the petition in the Chapter 11 proceedings, including the following:
  - (a) No mention was made in the answers of guarantees furnished to A. J. Armstrong Co., Inc., referred to in the petition.
  - (b) DAVID I. KOEGEL ENTERPRISES, INC. was alleged in the petition to hold a debenture (Schedule C), and in the answers, was variously alleged to hold notes and a debenture.
  - (c) The amount of the indebtedness of FLORA MIR to David I. Koegel Enterprises, Inc. is variously stated in the petition and the answers.
- 4. KOEGEL failed to conduct a search at any location other than 145 East 23rd Street, New York, New York. Flora Mir had many locations and some records undoubtedly are located elsewhere. Some may be at Mr. Koegel's home.
- 5. KOEGEL failed to seek dates and records from other sources which unquestionably could supply them and which were under his control. These would include David I. Koegel Enter-

prises, Inc., Mrs. Koegel, Koegel personally, their assignees (see item 3), taxing authorities, accountants, Financial Associates, Inc., the Kenmore Employees Pension Trust, Kenmore Management Corp. and the "Lorna and David Koegel Foundation".

## MISSTATEMENTS CONTAINED IN KOEGEL'S PRESENT AFFIDAVIT.

Mr. Koegel makes bald misstatements of fact in his present application, quite aside from the numerous statements which were regarded as merely misleading.

At page 6 of his affidavit, he makes the following statements:

"If there was any inadequacy in any of the Answers to the aforementioned four items of Interrogatories, the responsibility of same lies with my prior attorneys who were provided with all of the information required to answer same fully and adequately".

"I affirm that all information necessary to answer these four Interrogatories completely had previously been turned over to my former lawyers."

At pages 4 and 5, paragraph 4, Koegel states:

"4. I have previously made every good faith effort to provide my prior attorneys with all information necessary for them to prepare full and complete Answers to the Interrogatories served by the plaintiffs...only 4 Interrogatories out of 130 separately numbered Interrogatories propounded to each defendant were not adequately answered by the defendants."

The untruthfulness of these statements is readily apparent.

In his "Supplemental Answers No. 2," sworn to May 2,

1973, Mr. Koegel swore that he did not furnish his attorneys with data necessary to respond to Interrogatories numbered 14(c), 14(d), 15(d), 18, 46, 53, 64, 67, 73, 74, 78, 85, 87(d), 87(e), 88, 94, 102 and 115, explaining his failure as follows:

"Defendants have searched their records, including a search of the offices and files of defendants maintained and located at 145 East 23rd Street, New York, New York and have not been able to locate any additional writings, financial statements, balance sheets, or any other financial information which pertains to any of the companies which are the subject of any of the above Interrogatories. All of the financial information that defendants or either of them have been able to locate has been previously furnished. If defendants or either of them locate or learn the whereabouts of documents or information which have a direct or indirect bearing on these Interrogatories, defendants or either of them will provide plaintiffs with such documents or information concerning such documents immediately and without delay."

Up until the date of the foregoing statement, KOEGEL had refused to state in writing under oath that this information was not available. The foregoing statement was finally made only in an attempt to persuade Magistrate Goettel that defendants were acting in good faith. Now, having refused to answer these critical inquiries, KOEGEL brazenly proceeds to argue that only four interrogatories remain under consideration. These are the interrogatories numbered 20(a)-(c), 38, 45(h) and 66(h).

The insincerity of such a devious argument is demonstrable simply by resort in the three sets of responses furnished by KOEGEL. KOEGEL furnished responses as follows:

"Answers" -

dated January 23, 1973, sworn to by Koegel on January 26, 1973.

"Supplemental and Amended Answers" -

dated March 15, 1973, sworn to by Koegel on March 15, 1973.

"Supplemental Answers No. 2" -

dated May 1, 1973, sworn to be Koegel on May 2, 1972.

This is what Mr. Koegel said about the above-mentioned four items on three prior occasions:

Items 20(a)-(c).

Jan. 26:

"This information is currently unknown to defendants but will be provided as soon as obtained."

March 15:

- (a) Debentures were formally authorized on October 25, 1968 and delivered to defendant David I. Koegel on or about December 2, 1968.
- (b) The term of the debentures are the same as the terms of the debentures purchased by the plaintiffs.
- (c) Cash loans to Flora Mir totalling \$192,500.

May 2:

[no further response made]

Item 38:

Jan. 26:

"There are no notes, only a debenture."

March 15:

[no further response made]

May 2:

"See Exhibit A annexed hereto and incorporated herein."

Item 45(h):

Jan. 26:

"Defendant objects to these Interrogatories on the grounds that it is irrelevant, immaterial and burdensome."

March 15:

[no further response made]

May 2:

[no further response made]

Item 66(h):

Jan. 26:

"Defendant objects to these Interrogatories on the grounds that it is irrelevant, immaterial and burdensome."

March 15:

"65-71. In accordance with Federal Rules of Civil Procedure 33(c), there is annexed hereto as Exhibit G the financial statement of Borah Nut Company, Inc. as at April 30, 1967 and supplemental documents as of April 30, 1958, May 31, 1968 and November and December, 1968. The financial statement is a business record of defendants from which the answers sought may be derived or ascertained."

May 2:

[no further response]

The contradicting dates furnished with respect to Interrogatories 20(a)-(c) and 38 has already been noted. The documents furnished pursuant to Rule 33(c), FRCP necessitated a lengthy visit to the offices of Koegel's attorneys, where it developed that the documents furnished, besides not being for the period requested, were not readily identifiable either as to source of preparation or identities. These were not clear financial statements but worksheets. Similar tactics had been employed with respect to Interrogatories numbered 51-57, 65-71, 72-78, 79-85, 86-92, 93-99, 100-106 and 114-120. (Supplemental

and Amended Answers, March 15, 1973).

How can KOEGEL now state that he turned all necessary records over to his attorneys in the face of this kind of statement made as part of the response to Interrogatories 36 (March 15, 1973):

"(a) It is impossible to determine exactly how much money was lent to Flora Mir Candy Corporation or to any of the other corporations named in these Interrogatories."

## THERE IS NO INJUSTICE IN RENDERING A JUDGMENT AGAINST THE DEFENDANTS PURSUANT TO RULE 37 (d).

The defendants have clearly demonstrated every intention of avoiding a trial on the merits. Their present plea that they be afforded a trial on the merits is made solely for the purpose of further delay.

The Court has little choice when faced with tactics of recalcitrant defendants such as these except to resort to the sanctions authorized by Rule 37(d).

However, a deeper consideration of the case itself will reveal that the points upon which MR. KOEGEL has been most obstreperous in providing information related to information with respect to capital contributions supposedly made to the funds of FLORA MIR CANDY CORPORATION, through DAVID I. KOEGEL ENTERPRISES, INC. He has attempted to avoid answering these questions either by ignoring them or by furnishing evasive responses. As stated above, it should have been the easiest thing in the world for him to furnish the proof of such indebtedness. His position as a creditor is significant to the relationship between himself, FLORA MIR CANDY CORPORATION, DANDY CANDY CORPORATION (which he purchased in the Chapter XI proceedings by stock which he obtained in exchange for the supposed indebtedness to him by FLORA MIR CANDY CORPORATION) and the question of the use to which he supposedly put the money invested by the plaintiffs.

MR. KOEGEL states in his affidavit that this information is contained in a "100-page Bankruptcy Report which con-

tained all the details of the indebtedness of the defendant,
FLORA MIR CANDY CORPORATION (hereinafter "FLORA MIR") to DAVID

1. KOEGEL ENTERPRISES, INC. (hereinafter "ENTERPRISES").

Deponent has read the entire Court file in the Chapter XI proceedings of FLORA MIR CANDY CORPORATION. No such report is on file, nor do any papers on file contain any reference to such a report. Such a report would be unusual in bankruptcy practice. MR. KOEGEL undoubtedly intended to refer to an order of the Referee in Bankruptcy which incorporated a report on the matter of intercorporate indebtedness between FLORA MIR CANDY CORPORATION and its subsidiaries. This report was confined strictly to indebtedness between FLORA MIR CANDY CORPORATION and its own subsidiaries and did not relate in any manner to indebtedness to other parties such as DAVID I. KOEGEL ENTERPRISES, INC.

In making such statements, MR. KOEGEL overlooks the fact that the responses to the interrogatories were sworn to by him, as noted above, and that in those responses, he expressly disclaimed knowledge sufficient to respond to the questions.

How, then, will this action proceed if discovery proceedings are resumed? MR. KOEGEL disclaims knowledge of matters regarding which he cannot have been ignorant.

It is obvious that MR. KOEGEL is never going to give a true story of this transaction on discovery proceedings in this action. A reopening of the action will only result in great delay and more procrastination, and more motions pursuant to Rule 37(d) with the result that in another year or two, we will

all be back to this very point.

The defendants' motions should therefore be denied.

The motion has no substantive merit. No proper reason is shown for failure to respond on the motion. No proper reason is shown for failure to furnish the information directed to be furnished by the Court. The motion is predicated chiefly on the premise the defendants will comply in the future. There is no reason to believe that they will do so and every reason to believe that they will not. No adequate reason for failure to respond to the interrogatories during the present period is indicated. KOEGEL is glossing over the fact that he failed to appear for examination as office of DAVID I. KOEGEL ENTERPRISES, INC.

The present motion is a part of delaying tactics followed by defendants since the inception of this action. IF THE ORDER OF AUGUST 22, 1973 is VACATED, TRANSFER OF DEFENDANTS'
ASSETS SHOULD BE ENJOINED BY THIS COURT AND DISCLOSURE WITH RESPECT THERETO SHOULD BE DIRECTED.

MR. KOEGEL asserts in his affidavit (page 3) that lack of funds made it difficult for him to obtain new counsel. This is a startling disclosure. When MR. KOEGEL took over FLORA MIR CANDY CORPORATION, he was supposed to be a retired millionaire. That is what his press releases said. Now he is pleading poverty.

If plaintiffs are not permitted to enter judgment, and are thereby prevented from instituting supplementary proceedings

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immediately, then the defendants should be restrained from making any transfers of assets, without prior Court approval (except for payment of current operating expenses) and should be directed to submit to immediate examination concerning their assets.

Wherefore deponent respectfully submits that the defendants' motion to vacate this order of August 22, 1973, should be denied in all respects.

Harold B. Lawrence

Sworn to before me this 24th day of September, 1973.

AFFIDAVIT

STEVEN FLAKS, WILLIAM J. HACKETT, : Index No. 72 Civ. 1901 (MEL) ESTELLE JACOBSON, IRVING ORENSTEIN, INDUSTRIES, INC., JACK TOPPEL and
MILTON WEINGER MILTON WEINGER, SUPPLEMENTAL Plaintiffs, -against-DAVID I. KOEGEL AND FLORA MIR CANDY CORPORATION,

STATE OF NEW YORK ) : ss.: COUNTY OF NEW YORK )

HAROLD B. LAWRENCE, being duly sworn, deposes and says:

Defendants. :

I am the attorney associated with SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN, ESQS., in charge of the above captioned action and make this supplemental affidavit by reason of developments in this action which have occurred during the pendency of the defendants' motion to vacate the order of this court dated August 22, 1973 striking the defendants answer and by reason of statements contained in the affidavit of Arthur S. Olick, sworn to December 3, 1973.

After the order dated August 22, 1973 was entered, the defendants took no steps to vacate the order until the plaintiffs were about to enter a judgment based on the order. They then appeared through the firm of Weisman, Celler, Spett, Modlin & Wertheimer, and submitted affidavits in which both the prospective new attorneys and Mr. Koegel promised a marvelous transformation in the conduct of the defendants if only they would be given another opportunity to contest this action. In deponent's answering affidavit, deponent pointed out that the granting of such a request would inevitably lead to further delay in the enforcement of plaintiffs' rights in this action, loss of plaintiff's opportunity to collect the judgment they expected to obtain against defendants, and repeated further recourse to the court on motions pursuant to Rule 37 FRCP.

Now we have Arthur S. Olick's affidavit and it is obvious that all of the charges made by deponent were in fact true. Clearly, there is no possibility that if the order of August 22, 1973 is vacated the defendants will be any more cooperative than they have been up to this point. At this point in time, it may no longer be feasible for the plaintiffs to collect any judgment which they will obtain in this action. Further delay may prove fatal to plaintiffs' rights.

Mr. Koegel's affidavit reflects a long history of dilatory tactics on his part, going all the way back to June, 1972, when the interrogatories were originally required to be answered. Mr. Olick's affidavit chronicles the communications by letter and telephone and even by telegram urging Mr. Koegel to cooperate. At page 7 of his affidavit, Mr. Olick states:

"We were not furnished with all of the information required to provide full and complete answers; we were furnished with sometimes inadequate data; we were furnished with sometimes conflicting information; and, in each case, the answers to the interrogatories were carefully reviewed with Mr. Koegel and he approved the same in all respects. . . In each case and with each interrogatory and with each document he was consulted and pressed for information."

There is, therefore, no excuse for Koegel, personally. At page 8 of Mr. Olick's affidavit, Mr. Olick takes issue with Mr. Koegel again on the question of whether the necessary information had been furnished and clearly indicates that if present counsel proposes to furnish responses at the present time, he will have to do so on the basis of the same documentation now at hand and on the basis of improved cooperation by Mr. Koegel.

The likelihood of improved cooperation by Mr. Koegel is nil. This is clearly indicated by the history of this action, as presently confirmed by Mr. Olick's affidavit.

For the record, deponent wishes to note, in connection with a statement made by Mr. Olick at page 6 of his affidavit, that plaintiffs' attorneys on March 16, 1973 did not waive the option to examine Mr. Koegel at a hearing before Magistrate Goettel in connection with inadequacies in his answers to his interrogatories. Deponent consulted with Magistrate Goettel and, at the suggestion of Magistrate, submitted a further list of the respects in which the interrogatories were deficient and proceeded by motion on the basis of those deficiencies. As a matter of fact, prior to consultation with Magistrate Goettel, deponent advised James P. Heffernan, Esq., one of the defendants' attorneys, that he might seek to conduct an examina-

tion of Mr. Koegel before Magistrate Goettel and was advised by
Mr. Heffernan that an attempt to procure such an examination
would be resisted.

The order of August 22, 1973, was made after exhaustive hearings before Magistrate Goettel and consideration by the Court of Magistrate Goettel's report. The evidence now before the Court clearly demonstrates that the defendants' statements and promises are insincere and will not be kept. The conduct of the defendants is such as to afford no reason to believe that they will now comply with the rules of this court after refusing to do so for more than a year. Even were the Court inclined to give the defendants yet another chance, leaving the final decision to their future course of conduct, Mr. Olick's affidavit effectively disposes of any reasonable basis for believing that the defendants are making promises which can be believed and which will be kept. The delays which the defendants have caused thus far have severely prejudiced the rights of the plaintiffs. If the defendants are given the opportunity to cause still further delay, of any duration whatsoever, the effect on the rights of the plaintiffs may well be irremediable.

The deponent respectfully submits that nothing has changed since August 22, 1973 except that now we have confirmation from Mr. Olick of the merits of plaintiffs' application for an order striking defendants' answer. No valid reason has been presented to the court for vacating the order made on that date. The information now made available makes it all

the more urgent that plaintiffs be allowed to enter their judgment as soon as possible.

/s/ Harold B. Lawrence
Harold B. Lawrence

Sworn to before me this

6th day of December, 1973

/s/ Mary Pleffner

Mary Pleffner
Notary Public, State of New York
No. 41-3116970
Qualified in Queens County
Commission expires March 30, 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and : MILTON WEINGER,

Plaintiffs,

AFFIDAVIT AMICUS CURIAE

-against-

72 Civ. 1901 (MEL)

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

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STATE OF NEW YORK )

SS.:

COUNTY OF NEW YORK )

ARTHUR S. OLICK, being dul / sworn, deposes and says:

- 1. I am a member of the firm of KREINDLER, RELKIN,
  OLICK & GOLDBERG, former counsel for the defendants in the
  above entitled action. As such, I am familiar with the facts
  and circumstances underlying the present dispute involving
  defendants' motion to vacate this Court's order of August 22,
  1973 whereby the defendants' answer was stricken and a default
  judgment was directed to be entered against them.
- 2. I submit this affidavit at the request of the Court having been advised by David Shapiro, Esq., newly designated counsel for the defendants in this action, that the defendants do not assert any privilege and make no objection to my submitting an affidavit in this matter.

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- 3. I have been furnished with a copy of the affidavit of David I. Koegel sworn to on September 10, 1973. It is with respect to this affidavit that I furnish the following information.
- In paragraph 2 of his affidavit Mr. Koegel states that he had difficulty in obtaining new counsel. I am not aware of what efforts Mr. Koegel made to secure counsel except that I acknowledge having received two or three telephone calls from attorneys with whom I am acquainted in the City of New York who had been approached to represent Mr. Koegel. These attorneys inquired with respect to the merits of the case were advised by me that, in my opinion, there were meritorious defenses. I most emphatically deny that in any case I discouraged anyone from accepting a retainer from Mr. Koegel. In fact, it was to my advantage to encourage substitute counsel since the Court deferred the entry of a formal order of substitution so as to enable Mr. Koegel to procure counsel. Of course, the withdrawal of deponent's firm as counsel for the defendants did not come as any surprise to Mr. Koegel. As early as December 1972 Mr. Koegel was advised to secure new counsel. On February 7, 1973 deponent wrote to Mr. Koegel as follows:

"We have repeatedly requested that you advise us of the name of your new attorney so that this matter can be handled expeditiously and without prejudice to any of your rights. It is urgent that you take care of this matter at once. We simply cannot continue to work on your matters without being paid."

5. On numerous occasions thereafter, both orally and

in writing, deponent and other members of deponent's firm urged Mr. Koegel to procure substitute counsel. Only when he procrastinated and then finally told deponent that he had no intention of procuring other counsel was the motion to be relieved made. The motion was made on or about June 12, 1973, and a conference with respect to the motion was scheduled by the Court on June 22, 1973, to be held on June 27, 1973. Mr. Koegel was advised in writing on June 22, 1973 that Judge Lasker had called a conference on that specific matter for June 27, 1973. Deponent's letter to Mr. Koegel of June 22, 1973 urged Mr. Koegel to "appear with your new attorney". At the hearing before Judge Lasker on June 27, 1973 Jerome E. Goldman, Esq., appeared on Mr. Koegel's behalf and represented himself to be Mr. Koegel's personal attorney but not the attorney retained to represent the defendants in this pending action. The Court advised Mr. Goldman that the motion of deponent's firm would be granted but an order would not be entered at that time in deference to Mr. Goldman who expressed a desire on the part of Mr. Koegel to present certain facts to the Court in connection with deponent's motion to withdraw as defense counsel. Court gave Mr. Koegel until July 20, 1973 to submit an affidavit in relation to that motion. All of this was confirmed in a letter from Judge Lasker to Mr. Koegel dated June 28, 1973. Of course, Mr. Koegel did not avail himself of the opportunity afforded to him by the Court and the motion of deponent's firm to withdraw as attorneys for the defendants was duly granted on July 25, 1973.

6. Mr. Koegel further states in paragraph 3 of his affidavit that he "was never served or made aware" of this Court's order of June 21, 1973 directing the defendants to further answer certain of the interrogatories propounded by the plaintiffs. He further states that he was never informed by deponent's office of "the existence of such an order". This is untrue. Mr. Keogel was repeatedly advised of the problems respecting answers to interrogatories and the repeated efforts of plaintiffs' counsel to compel further answers and to impose sanctions against the defendants for allegedly inadequate responses. Not only were there numerous conversations with Mr. Koegel on this subject but deponent's file is replete with correspondence in which deponent and other attorneys in deponent's firm pleaded with Mr. Koegel to furnish full, complete, and responsive, answers to the interrogatories. The interrogatories were forwarded to Mr. Koegel by letter dated June 21, 1972 with a request that he draft appropriate answers. Unable to contact Mr. Koegel, we wrote to him on July 28, 1972, advising him that if he did not furnish us with the information required by the interrogatories "there is a possibility that the Court may permit the plaintiffs to recover judgment against you on the basis of our failure to answer the Interrogatories". In response to our letter of July 28, 1972, we were advised that Mr. Koegel would soon be returning from a trip abroad and would then furnish the requisite information. Accordingly, we secured an extension of time and made certain representations with respect to when the interrogatories would be answered.

Suffice it to say that we were greatly embarrassed by our inability to perform as represented. By letter dated December 21,
1972, James P. Heffernan, Esq., of deponent's office specifically
advised one of Mr. Koegel's closest associates what information
was required and that defendants were in default which default
was prejudicial to their case. This letter followed a lengthy
meeting with Mr. Koegel in deponent's office.

7. By letter dated January 23, 1973, deponent's office forwarded to Mr. Koegel the original set of answers to the interrogatories propounded to the defendants with a request that the answers be reviewed carefully. At that time we pointed out to Mr. Koegel that some of the answers were incomplete by reason of the fact that he had not furnished us with the requisite information. We pointed out to him once again what information was required and that the plaintiffs had made a motion to strike the defendants' answer. On January 24, 1973, having failed to hear from Mr. Koegel, deponent's office sent him a telegram as follows:

"Urgent. Please contact me immediately. You are in danger of having a default judgment entered against you in the bondholders' suit."

8. Similar communications were sent to Mr. Koegel in writing dated February 2, 1973, February 7, 1973, February 26, 1973 and February 28, 1973. In response to all of these communications Mr. Koegel finally provided certain additional information so that on March 15, 1973, deponent's firm was able to serve plaintiffs' attorneys with supplemental and amended answers to plaintiffs' interrogatories. An earlier directive

140a of Magistrate Goettel gave the attorneys for the plaintiffs the option to require Mr. Koegel to appear before the Magistrate on March 19, 1973, to answer questions concerning inadequacies in his answers to the interrogatories. Our office was advised by plaintiffs' attorneys on March 16, 1973, that they were not exercising the option but were reviewing the supplemental and amended answers. They subsequently objected to the adequacy of the answers by letter to Magistrate Goettel of April 5, 1973. The Magistrate called a hearing for April 17, 1973, at which time we were directed to either furnish certain additional answers or to state what attempts had been made to locate the missing information. Mr. Koegel was promptly advised of this disposition. Deponent and Mr. Heffernan personally went to Mr. Koegel's offices here in New York City in an effort to locate the missing data. Many hours were spent going through the dusty file drawers, old file folders and mouldy cartons in an effort to find the "missing" documents and data. Whereas these efforts produced certain information they failed to turn up all of the information that was required and Mr. Koegel undertook to search further. Most important, Mr. Koegel was repeatedly advised at all times to and including June 27, 1973 that the data sought by interrogatories 20(a), (b), and (c), 38, 45(b) and 66(b) was required so that adequate responses could be made.

9. Deponent believes that Mr. Koegel tried in good faith to furnish the requisite information. However, his files are in such disarray and he has been involved in so many complicated transactions that it was difficult, if not impossible, for

him to fully satisfy the plaintiffs' attorneys. Many of the documents which were furnished required explanations as to their meaning and, in some cases, Mr. Koegel's explanations varied from time to time. Also, his recollection respecting the contents of certain documents was sometimes faulty. Deponent confirms that Mr. Koegel, albeit under great pressure from deponent's office, furnished many documents and much information as attested by the volumes of material contained in the answers to the voluminous interrogatories propounded by the plaintiffs. However, it is not true, as Mr. Koegel alleges, that "any inadequacy in any of the Answers to the. . . Interrogatories. . . " is the responsibility of deponent's firm. We were not furnished with all of the information required to provide full and complete answers; we were furnished with sometimes inadequate data; we were furnished with sometimes conflicting information; and, in each case, the answers to the interrogatories were carefully reviewed with Mr. Koegel and he approved the same in all respects. If the significance of any document was not recognized, overlooked or misdescribed it was because Mr. Koegel's recollection was faulty. In each case and with each interrogatory and with each document he was consulted and pressed for information. Of course, time dims the memory and the subject transactions go back some years.

10. If Mr. Koegel encountered difficulties after June 27, 1973 by reason of his inability to secure access to the papers in the possession of deponent's firm, the fault lies entirely with Mr. Koegel. He had been warned for several months

that his failure to make payment of fees would result in our withdrawal from the case and the assertion of our statutory and common law liens against his files. We did indeed assert our liens against his files and refused to release the same for any purpose unless he either bonded his indebtedness to us or made appropriate arrangements for the payment of fees and disbursements. Deponent invited Mr. Koegel and various attorneys purporting to represent him during the interim period to move in Court for a turnover of the files but they refused to follow this procedure. Finally, Mr. Koegel, through the good offices of his present attorney, made an appropriate arrangement with deponent's firm for payment and the files were immediately released. However, deponent does not believe, as Mr. Koegel alleges, that "all information necessary to answer the [disputed] Interrogatories... " had previously been turned over to this office. Certainly, in the absence of an appropriate explanation from Mr. Koegel many of the documents were meaningless. This explanation he did not furnish. I am now advised by his new counsel that, in his opinion, there is sufficient data in the materials deponent turned over to him to answer satisfactorily the disputed interrogatories. If this is true it is attributable to a greater ability on the part of substitute counsel to secure Mr. Koegel's attention and prod his recollection than that possessed by deponent and his associates.

11. Mr. Koegel's statements in paragraph 4 of his affidavit respecting the nature of the fee dispute with deponent's office are incorrect. Nevertheless, that subject is not germaine to the instant motion and deponent will not, absent a specific request, disclose the nature of the negotiations and the dispute over money. Suffice it to say that Mr. Koegel was at all times advised in a timely fashion of his responsibilities, the requirements for information to answer interrogatories and the necessity to appear for deposition. There were no last minute crises except such as were occasioned by Mr. Koegel's unavailability. Mr. Koegel apparently travels a great deal and is often incommunicado.

12. Despite all of the above deponent is of the opinion that there are meritorious defenses to this suit and urges that the Court afford Mr. Koegel the opportunity, through his new attorneys, to present his case on the merits.

ARTHUR S. OLICK

SWORN to before me this 3rd day of December, 1973

Notary Public

## UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and : MILTON WEINGER,

MOTION TO WITHDRAW AS DEFENDANTS' COUNSEL

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

72 Civ. 1901 (MEL)

Defendants. :

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ARTHUR S. OLICK, ESQ., sworn to the 12th day of June, 1973, the undersigned will move this Court before the Hon. Morris E.

Lasker, one the the Judges of this Court, in Room 2903, of the United States Courthouse, Foley Square, New York, New York on the 22nd day of June, 1973, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 4(c) of the General Rules for the United States District Court for the Southern District of New York, permitting defendants' attorneys, Kreindler, Relkin, Olick & Goldberg, to withdraw from the above entitled action on the ground that defendants have failed to cooperate with their attorneys and, further, have refused to make sufficient arrangements to pay for extensive legal fees already incurred.

Dated: New York, New York June 12, 1973

Yours, etc.

KREINDLER, RELKIN, OLICK & GOLDBERG
Attorneys for Defendants
Office and Post Office Address
500 Fifth Avenue
New York, New York 10036
(212) 594-9600

TO: SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN
Attorneys for Plaintiffs
Office and Post Office Address
200 Madison Avenue
New York, New York 10016

Mr. David I. Koegel 145 Tast 23rd Street New York, New York

Flora Mir Candy Corporation 145 East 23rd Street New York, New York

AFFIDAVIT

72 Civ. 1901 (MEL)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FALKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : MARTIN B. PERLMAN, SHARKLINE

INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER.

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

STATE OF NEW YORK : SS.:

COUNTY OF NEW YORK )

ARTHUR S. OLICK, being duly sworn, deposes and says:

I am an attorney at law, a member of the bar of this Court and a member of the firm of KREINDLER, RELKIN, OLICK & GOLDBERG, attorneys of record for the defendants in the aboveentitled matter. I am fully familiar with all the facts and circumstances leading up to and culminating in the instant motion. I submit this affidavit in support of my firm's application for an Order pursuant to Rule 4(c) of the General Rules for the United States District Court for the Southern District of New York, relieving it as attorneys for defendants David I. Koegel and Flora Mir Candy Corporation herein.

## BACKGROUND

2. Defendants were served with a Summons and Complaint on May 15, 1972. Plaintiffs' action is based upon alleged fraud and deceit and upon alleged violations of \$\$5 and 17(a) of the Securities Act of 1933 and \$10(b) 5 of the Securities and Exchange Act of 1934 and the Rules and Regulations promulgated thereunder. Since your deponent's firm interposed an answer on behalf of defendants Koegel and Flora Mir, the parties have been locked in a continuing struggle over discovery, centering mainly around answers to numerous interrogatories propounded by the plaintiffs. Also, defendants have leposed six of the eight plaintiffs and plaintiffs have deposed three witnesses.

3. The problems encountered by your deponent's law firm in connection with composing answers to plaintiffs' interrogatories have been legion. These problems have resulted in extensive motion practice and hearings before the Hon. Gerald L. Goettel, U.S. Magistrate. Deponent's firm has advised defendants on numerous occasions of the necessity and importance of furnishing the information sought by plaintiffs' interrogatories.

Nevertheless, it has been extremely difficult to obtain defendants' full cooperation.

## BASIS FOR WITHDRAWAL

4. Deponent's firm has not received the cooperation it demands of its clients, particularly with respect to the preparation of answers to the numerous interrogatories propounded by plaintiffs. Moreover, defendants have refused and failed to make payment of the fees ordinarily charged by deponent's firm to its clients despite the fact that defendants originally agreed to

make payment at regular time charge rates promptly upon being billed therefor. In connection with the instant case and with other matters in which deponent's law firm represented either defendant Koeqel or defendant Flora Mir Candy Corporation, extensive legal fees have been incurred. Defendants herein refused to make any adequate provisions to pay for the legal fees, even though your deponent's law firm agreed to substantially lower the amount thereof. Defendant Koegel has disputed virtually all bills rendered to him and refused to arrange for their payment.

- 5. Originally, deponent's firm was withdrawing from this matter with the consent of the defendants. Such consent was given on June 6, 1973, the day before defendant Koegel was supposed to testify as a witness in this matter. Deponent's firm offered to appear with Mr. Koegel at the deposition then scheduled but Mr. Koegel refused our offer. Such refusal was made even though Mr. Koegel was advised that his failure to appear could substantially harm his case.
- 6. On June 7, 1973, Mr. Koegel called deponent and revoked his consent to our withdrawing from this case. He refused to obtain substitute counsel while refusing, at the same time to pay for services rendered and to be rendered. Deponent advised Mr. Koegel that this motion would be made and again urged that he find substitute counsel. He refused. It is not without regret that this application is made. However, the relationship between attorney and client is one of an unusual character, based on the fundamental [sic] elements of trust arg

and confidence. It is your deponent's belief that the fundemental [sic] elements necessary are no longer present in the instant situation and that the facts manifest good and sufficient cause for the Court permitting your deponent's firm to withdraw as counsel for defendants in this matter.

WHEREFORE, your deponent respectfully requests that this Court enter an Order relieving KREINDLER, RELKIN, OLICK & GOLDBERG as attorneys for defendants in the above captioned matter.

/s/ Arthur S. Olick
ARTHUR S. OLICK

Sworn to before me this 12th day of June, 1973

/s/ James P. Heffernan Notary Public

James P. Heffernan
Notary Public, State of New York
No. 31-1736201
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FLAKS, WILLIAM J. HACKETT, :
ESTELLE JACOBSON, IRVING ORENSTEIN,
MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, :
INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901 (MEL)

AFFIDAVIT IN CPPOSI: TION TO MOTION OF
DEFENDANTS COUNSEL
: FOR LEAVE TO WITHDRAW.

Plaintiffs,

- against -

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

HAROLD B. LAWRENCE being duly sworn deposes and says:

I am an attorney at law associated with SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN, Esqs., attorneys for plaintiff and am familiar with the facts and circumstances of this action. I make this affidavit in opposition to the motion of the defendants' attorneys for leave to withdraw as counsel for the defendants in this action.

Defendants' attorneys here made their motion on the grounds that the defendants have failed to cooperate with them; that defendants' lack of cooperation necessitated numerous motions relating to discovery proceedings in this action; that despite the consequently heavier workload, the defendant Koegel has unreasonably refused to arrange for payment of their fees.

Leave to withdraw should be denied because such withdrawal will severely prejudice the rights of the plaintiffs. The conduct of David I. Koegel, as described in the affidavit of Arthur Olick, submitted in support of the motion, clearly is designed to disrupt the progress of this action at a critical point and to slow it down. A full analysis of what is revealed by Mr. Olick's affidavit is set forth in deponent's supplemental affidavit submitted in support of plaintiff's motion to dismiss the defendants' answer, a copy of which is annexed hereto and made part hereof in order to avoid duplication. Koegel has deliberately provoked this situation in order to delay the action, at a time when the court has under consideration Magistrate Goettel's recommendation that Koegel pay plaintiffs' attorneys the sum of \$1,000 to cover for their time spent on the motions made to compel responses to the interrogatories; at a time when two motions are pending before this court for dismissal of defendants' answer pursuant to Rule 37(d); and at a time when a critical examination before trial, of David I. Koegel Enterprises, Inc., was supposed to be conducted in connection with some of the matters regarding which he refused to answer interrogatories.

Not only is there no indication that the defendants intend promptly to retain new counsel prepared to act in this case immediately on the matters now pending before the court, but, on the contrary, Koegel's attorneys state that he refused to consent to their withdrawal from the case. The defendant refuses to permit his counsel to withdraw at the same time that he refuses to pay them. His purpose in adopting this contradictory stance is

obviously to create a procedural impasse.

If the court grants this motion, plaintiffs will be subjected to further delay in prosecution of this action and probably will encounter extreme difficulty in collecting their judgment after this action is determined. The defendants have now fought discovery for a year and show every sign of continuing to do so. Their contradictory conduct towards their attorneys is part of the pattern.

WHEREFORE, deponent respectfully requests that the motion of defendants' counsel for leave to withdraw be denied, or that the court make such other direction as it deems just and proper in the premises.

/s/ Harold B. Lawrence
Harold B. Lawrence

Sworn to before me this 18th day of June, 1973.

/s/ Louis Raybin

Louis Raybin
Notary Public, State of New York
No. 24-8504925
Qualified in Kings County
Certificate filed in New York County
Term Expires March 30, 1:34

STEVEN FLAKS, et al v. DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION: 72 Civ. 1901

Plaintiffs' motion in the above case to compel answers to interrogatories having come on to be heard by the undersigned and having been referred to the Honorable Gerard L. Goettel, U.S. Magistrate, for hearing and report, and said hearing having been held, and said report having been made on May 22, 1973, and the Court being fully advised, it is

ORDERED that unless defendants provide answers to items 20(a), (b) and (c), 38, 45(b) and 66(b) within twenty days after the date of the entry of this order that the answer be stricken, and it is

FURTHER ORDERED that attorneys fees in the amount of \$1,000 be assessed against defendants, payable to the plaintiffs.

SO ORDERED:

/s/ Morris E. Lasker U.S.D.J.

DATED: New York, N.Y. June May 21, 1973

-x

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : 72 Civ. 1901 MEL MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

: NOTICE OF MOTION TO STRIKE ANSWER FOR FAILURE TO RESPOND TO INTERROGATORIES

Plaintiffs,

- against -

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of HAROLD B. LAWRENCE, sworn to the 13th day of June, 1973, the notice to take deposition of David I. Koegel Enterprises, Inc., dated April 10, 1973, the stipulations of counsel to the parties dated May 10, 1973, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move before Hon. Morris E. Lasker, at Room 2903, United States Court House, Foley Square, New York, on the 27th day of June, 1973, at the opening of Court on that day or as soon thereafter as counsel may be heard for an Order pursuant to Rule 37(d) and Rule 37(b)(2)C striking out the answer of the defendants, David I. Koegel and Flora Mir Candy Corporation and rendering judgment by default against them and in favor of the plaintiffs for the relief demanded by them in their respective causes of action, by reason

of said defendants' wilful and deliberate obstruction of discovery to which plaintiffs are entitled, and granting such other and further relief as the Court may deem just and proper in the premises.

Dated: New York, New York June 13, 1973

Yours, etc.

SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN

By: /s/ Harold B. Lawrence
Harold B. Lawrence
Attorneys for Plaintiffs
Office and Post Office Address
200 Madison Avenue
New York, New York 10016
Tel. (212) 532-9194

TO: KRIENDLER, RELKIN, OLICK & GOLDBERG, ESQS.
Attorneys for Defendants
500 Fifth Avenue
New York, New York 10036
Tel. (212) 594-9600

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901 (MEL)

AFFIDAVIT IN SUPPORT
OF PLAINTIFFS' MOTION
TO STRIKE THE ANSWERS
THE DEFENDANTS

Plaintiffs,

- against -

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

:

STATE OF NEW YORK )

COUNTY OF NEW YORK )

HAROLD B. LAWRENCE, being duly sworn, deposes and says:

1. I am an attorney at law associated with SALON, ORTNER, YAVERS, DERSHOWITZ & RAYBIN, Esqs., attorneys for the plaintiffs herein. I am familiar with the facts and circumstances of this action and make this affidavit in support of plaintiffs' motion to strike the answer interposed by the defendants. This is an action to recover damages for fraud and deceit and for violations of Section 5 and 17a of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. The summons and complaint herein was served on the defendants on May 15, 1972. Copies of the complaint and of the defendants'

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answer are annexed hereto as Exhibits "A" and "B", respectively.

- 2. The present motion is made while the court still has before it plaintiffs' motion for dismissal of the defendants' answer by reason of their failure to respond to interrogatories. That motion was made on January 4, 1973. Magistrate Gerard L. Goettel has rendered a report, dated May 22, 1973 recommending that the answer be dismissed unless certain information is furnished. Magistrate Goettel found as a fact, that defendants were not cooperative even with their own attorneys. Circumstances which have occurred since Magistrate Goettel made his report indicate that the defendants intend to continue their dismal pattern of behavior if allowed to do so by the court.
- 3. The defendant, DAVID I. KOEGEL, is the principal stockholder and President of FLORA-MIR CANDY CORPORATION. He is also a 50% stockholder and President of DAVID I. KOEGEL ENTERPRISES, INC. Mrs. Lorna J. Koegel, his wife, holds the other 50% of the stock. Koegel is the sole manager of the affairs of David I. Koegel Enterprises Inc., a fact which has been affirmed to deponent by both his attorneys and by Mrs. Koegel upon an examination before trial of Mrs. Koegel as a witness, conducted on June 6, 1973.
- 4. On April 10, 1973, deponent served separate notices of examination before trial of David I. Koegel Enterprises, Inc., as a witness and of Lorna Koegel as a witness. Mrs. Koegel is the wife of the defendant, David I. Koegel, treasurer of David I. Koegel Enterprises, Inc., and a 50% stockholder of that corporation. Defendants' counsel had advised deponent that only David

Koegel could testify as to the affairs of the corporation and so the examinations were scheduled for separate dates. The examinations were scheduled for May 10, 1973 in the case of Mrs. Koegel and for May 15, 1973 in the case of the corporation. Subpoenas were also issued in connection with the examinations. In the case of David I. Koegel Enterprises, Inc., the notice and the subpoena required the production of pertinent records relating to transactions between David I. Koegel Enterprises, Inc., and the defendants named in this action. A copy of the notice of examination of David I. Koegel Enterprises, Inc., is annexed hereto as Exhibit "C". A copy of the notice directed to Mrs. Koegel is annexed as Exhibit "D". (Acceptance of the subpoena directed to David I. Koegel Enterprises, Inc., was refused at the offices of the corporation.)

- 5. In addition to the notices of examination, deponent, on April 10, served in connection with the proposed examinations, a request for production of documents pursuant to Rule 34 by Flora Mir Candy Corporation. This required defendant, Flora Mir Candy Corporation, to produce books, papers and records relating to its dealings with David I. Koegel Enterprises, Inc. The notice was returnable May 14, 1973 at 2:00 p.m. A copy of the request for production is annexed hereto as Exhibit "E".
- 6. The subject matter of the proposed examination related to circumstances with respect to which the defendants had failed and refused to furnish information in other discovery

proceedings in this action. Interrogatories had been propounded which among other things, inquired into intercorporate transactions between David I. Koegel Enterprises, Inc., and defendant Flora Mir Candy Corporation. The refusal of the defendant to furnish this and a lot of other information requested in the interrogatories compelled deponent to move for dismissal of the defendants' answer on January 4, 1973. A copy of the motion papers (without exhibits) and reply affidavit submitted in support of the motion are annexed hereto as Exhibit "F". Lenghty proceedings were conducted on said motion before two United States Magistrates in the course of which David I. Koegel clearly demonstrated a contumacious refusal to heed the numerous directions made by the Magistrates to the defendants to furnish responses to the interrogatories. Several sessions were held with the Magistrates, after each of which some further information in response to the interrogatories was grudgingly given by the defendants. To the present date, however, they remain largely unanswered on the grounds that records are not available.

7. However, in some matters the pattern of evasion is so clear that the defendants were directed to furnish the information in spite of the excuses for noncompliance which they had offered. This was particularly true with respect to those matters which formed the subject matter of the proposed inspection of documents and the proposed examination of the witness, David I. Koegel Enterprises, Inc. In his Report and Recommendation dated May 22, 1973, a copy of which is annexed hereto as Exhibit "G", Hon. Gerard L. Goettel, United States Magistrate,

"Items 20(a), (b), and (c) concern intercorporate transactions between the corporate
defendant and the David I. Koegel Enterprises,
Inc., another corporation controlled by the
individual defendant. The final supplemental
answers to those interrogatories acknowledges
such transactions but does not give complete
details as to the dates or considerations
for the various loans. The defendants should
set forth the dates upon which each advance
occurred, the amount of each loan, the terms
thereof, and any documents which were given
evidence in the transactions.

"With respect to item 38 the defendants have been asked to set forth the terms of any promissory notes or other evidence of indebtedness concerning transactions of the corporation defendants. The answer refers to a document. The document supplied is a blank form with the name of the payee eliminated and is obviously not a proper response to the interrogatory. (It should be noted that the supplemental answers are inconsistent with respect to the documents involved, at one point claiming that it was a promissory note and at another time stating that it was a debenture.) The interrogatory should be answered in detail or a copy of the actual document involved should be supplied."

8. Sometime during the month of April, 1973,
deponent received a telephone call from James P. Heffernan, one
of the defendants' attorneys, in which he stated that he was
engaged in conducting depositions in another action pending in
this court throughout the month of May, 1973 on an almost continuous basis pursuant to a court order. He requested an extensive adjournment as a matter of professional courtesy. Notwithstanding the dismal history of defendants' noncompliance
with deponent's interrogatories, deponent agreed with Mr. Heffernan to adjourn the examinations of Mr. Koegel to June 6, 1973
and of David I. Koegel Enterprises, Inc. to June 7, 1973.

However, deponent expressly made his agreement conditioned upon

(a) execution of a formal stipulation, (b) conduct of the examination at deponent's office. (Mrs. Koegel was scheduled to be examined in White Plains, New York.)

- 9. A stipulation was accordingly entered into, a copy of which is annexed hereto as Exhibit "H". Mrs. Koegel's examination was adjourned to June 6, 1973. The examination of David I. Koegel Enterprises, Inc., was adjourned to June 7, 1973. As previously noted, Mr. Heffernan had advised deponent that the defendant, David I. Koegel, was the only person knowledgeable with respect to the affairs of the corporation, and the examination dates were therefore kept distinct. The stipulation also provided that the production of the records of Flora Mir Candy Corporation pursuant to the Request for Production dated April 10, 1973, scheduled for May 14, 1973, was to be adjourned to June 1, 1973.
- of records, corporate records of Flora Mir Candy Corporation, some cancelled checks drawn on accounts of David I. Koegel Enterprices, Inc., David Koegel and Lorna Koegel, corporate minutes of Flora Mir Candy Corporation and corporate minutes of David I. Koegel Enterprises, Inc., were produced. No bank statements or check books, and no accounting books and ledgers of any kind were produced. The material produced without the aforesaid related books, statements and records, was meaningless and uninformative.
  - 11. On the morning of June 6, 1973 at about 9:30 A.M.,

Mr. Heffernan called deponent and advised that Mr. Koegel was out of town and requested a further adjournment of the examination of David I. Koegel Enterprises, Inc. In view of the facts that one extension had been granted, that an agreement had been made to conduct the examination on June 7th, and in view of the long history of broken promises made to furnish responses to interrogatories, deponent declined to consent to a further adjournment. Mr. Heffernan stated that Mr. Koegel was in North Carolina but conceded that Mr. Koegel had had prior knowledge of the scheduled date of the examintion.

- nan appeared at deponent's office with Mrs. Koegel and was present through the examination, consulting with the witness, assisting her, and on occasion making objections to questions. Mrs. Koegel disclaimed any knowledge. Mrs. Koegel testified that from time to time Mr. Koegel had given her large amounts of money to deposit and from time to time she received checks at his request as treasurer of David I. Koegel Enterprises, Inc., but she otherwise had no knowledge of the affairs of the corporation. At the conclusion of her examination, Mr. Heffernan repeated the request for adjournment of the examination of David I. Koegel Enterprises, Inc., scheduled for the following day. Deponent refused to agree to an adjournment. Mr. Heffernan stated that he would appear on June 7, 1973 to make a statement for the record.
- 13. On June 7, 1973 a stenographer was present and prepared to take the examination of David I. Koegel Enterprises, Inc. Annexed is the transcript showing default (Exhibit "I").

Instead of appearing, at about 9:30 A.M. on that morning the defendants' attorneys delivered a letter, a copy of which is annexed hereto as Exhibit "J". The letter is a confused statement in which defendants' counsel indicate that they are both in and out of this case. They act for the witness in requesting time. They also say that they had offered to act as attorneys for David I. Koegel Enterprises, Inc., but that the offer had been "declined". They do not state to whom the offer had been made, nor who declined to accept the offer. In any event, as of the present date they have not made application to this Court for leave to withdraw as counsel.

14. The fact is that once again David I. Koegel has refused to make information available which is recessary to enable plaintiffs properly to prosecute this action. A finding has already been made by Magistrate Gerard L. Goettel to the effect that Mr. Koegel has failed to cooperate with his own attorneys as well as with deponent in making information available which properly should be disclosed. The papers submitted on the previous motion under Rule 37(d) in this action, together with a copy of Magistrate Goettel's report and recommendations, copies of which are annexed hereto, describe the defendants' contemptuous conduct and utter failure to comply with the discovery rules and with the Magistrate's Order up to this point. It is now apparent that the proceedings before the Magistrate have not induced Mr. Koegel to change his conduct in the slightest. They are continuing to obstruct plaintiffs' discovery at the very moment the Court has under consideration the Magistrate's recommendations hereinafter set forth.

15. The circumstances of this case are such that Magistrate Goettel stated the following in his report:

"It is apparent that the defendants have not been cooperating with their own counsel, much less plaintiffs' counsel, in affording discovery in this case. It is recommended that an Order be entered directing that unless the defendants provide answers to items 20(a), (b) and (c), 38, 45(b) and 56(b) within twenty days after the date of the Court's Order that their Answer be stricken. It is further recommended, in view of the several motions necessary to reach this point, that attorneys' fees be assessed against these defendants and in favor of the plaintiffs pursuant to Rule 37(a) (4) and (b) (2)."

16. Under the circumstances deponent respectfully requests that an order be made herein dismissing the answer of the defendants and granting judgment in favor of the plaintiffs for the relief demanded in the complaint.

/s/ Harold B. Lawrence
Harold B. Lawrence

Sworn to before me, this 13th day of June, 1973

/s/ Lewis Fishlin Notary Public

Lewis Fishlin
Notary Public, State of New York
No. 60-4500064
Qualified in Westchester County
Commission Expires March 30, 1975

[EXHIBIT A omitted]

COMPLAINT

[EXHIBIT B omitted]

ANSWER

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FL'KS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and : MILTON WEINGER,

72 Civ 1901

:

Plaintiffs,

-against-

NOTICE TO TAKE
DEPOSITION OF WITNESS
DAVID I. KOEGEL
ENTERPRISES, INC.

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

-----X

SIRS:

PLEASE TAKE NOTICE that the plaintiffs will take the deposition of DAVID I, KOEGEL ENTERPRISES, INC., 145 East 23rd Street, New York, New York, as a witness in the above action, before a notary public in and for the County of New York, or some other officer or person authorized to administer oaths, on the 15th day of May, 1973, at 2:00 P.M. at the offices of SALON, ORTNER, YAVERS, DERSHOWITZ AND RAYBIN, Esqs., 200 Madison Avenue, New York, New York 10016, pursuant to Rule 26 of the Federal Rules of Civil Procedure. If the deposition of said witness is not completed on said date, same will be continued from day to day until completed.

PLEASE TAKE FURTHER NOTICE that said witness, DAVID I.

KOEGEL ENTERPRISES, INC. is required to produce at said examination all papers, communications, books, records, contracts, or

other documents in its possession or control in any way related to the matters in controversy in this action, including but not limited to all records of transactions between DAVID I. KOEGEL ENTERPRISES, INC. and the defendants named in this action.

You are invited to attend and cross-examine.

Dated: New York, New York April 10, 1973

Yours, etc.

SALON, ORTNER, YAVERS, DERSHOWITZ & RAYBIN

By /s/ Harold B. Lawrence
Harold B. Lawrence

Attorneys for Plaintiffs

Office & P. O. Address: 200 Madison Avenue New York, New York 10016 Tel. #(212) 532-9194

TO: DAVID I. KOEGEL ENTERPRISES, INC. 145 East 23rd Street New York, New York

KREINDLER, RELKIN, OLICK & GOLDBERG, ESQS.
Attorneys for Defendants
500 Fifth Avenue
New York, New York 10036

EXHIBIT D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

72 Civ. 1901

NOTICE TO TAKE DEPOSITION OF WITNESS LORNA KOEGEL

Plaintiffs,

:

:

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that the plaintiffs will take the deposition of LORNA KOEGEL, Stratford Road, Harrison, New York, as a witness in the above action, before a notary public in and for the Westchester County, or some other officer or person authorized to administer oaths, on the 10th day of May, 1973, at 10:00 A.M. at the offices of Hon. HOWARD SCHWARTZBERG, Referee in Bankruptcy, 30 South Broadway, Yonkers, New York, Room 321, pursuant to Rule 26 of the Federal Rules of Civil Procedure. If the deposition of said witness is not completed on said date, same will be continued from day to day until completed.

PLEASE TAKE FURTHER NOTICE that said witness, LORNA KOEGEL, is required to produce at said examination all papers, communications, books, records, contracts, or other documents in her possession or control in any way related to the matters in controversy in this action, including but not limited to all

EXHIBIT D

records of transactions between DAVID I. KOEGEL ENTERPRISES, INC. and the defendants named in this action.

You are invited to attend and cross-examine.

Dated: New York, New York April 25, 1973

Yours, etc.

SALON, ORTNER, YAVERS, DERSHOWITZ AND RAYBIN

By: /s/Harold B. Lawrence Harold B. Lawrence

Attorneys for Plaintiffs

Office & P. O. Address 200 Madison Avenue New York, New York 10016 Tel. #(212) 532-9194

TO: LORNA KOEGEL Stratford Road Harrison, New York

KREINDLER, RELKIN, OLICK & GOLDBERG, ESQ. Attorneys for Defendants 500 Fifth Avenue
New York, New York 10036

EXHIBIT E

## UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STEVEN FLAKS, WILLIAM J. HACKETT,
ESTELLE JACOBSON, IRVING ORENSTEIN,:
MARTIN B. PERLMAN, SHARKLINE
INDUSTRIES, INC., JACK TOPPEL and
MILTON WEINGER,

Plaintiffs,

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants.

72 Civ. 1901 MEL

REQUEST FOR PRODUCTION
OF DOCUMENTS PURSUANT
TO RULE 34, FEDERAL
RULES OF CIVIL PROCEDURE

SIRS:

PLEASE TAKE NOTICE that the plaintiffs, pursuant to Rule 30(b)(5) and 34 of the Federal Rules of Civil Procedure, do hereby request that the defendant, FLORA MIR CANDY CORPORATION, produce and permit the plaintiffs or the undersigned acting on their behalf, at the offices of the undersigned attorneys, SALON, ORTNER, YAVERS, DERSHOWITZ and RAYBIN, ESQS., 200 Madison Avenue, New York, New York 10016, Room 1511, on the 14th day of May, 1973, at 2:00 P.M. to inspect and copy the following documents or writings:

- 1. All letters, correspondence, memoranda, and communications in writing had or passed between and/or among employees and officers of the defendant, FLORA MIR CANDY CORPORATION and DAVID I. KOEGEL ENTERPRISES, INC.
- 2. All records, documents, agreements, evidences of indebtedness, and correspondence pertaining to loans made to

EXHIBIT E

FLORA MIR CANDY CORPORATION, and/or any corporation affiliated with it, by DAVID I. KOEGEL ENTERPRISES, INC., and/or DAVID I. KOEGEL, and/or LORNA KOEGEL.

3. All bookkeeping entries contained in the books and records of FLORA MIR CANDY CORPORATION showing receipt of monies on account of the above mentioned loans and payments made on said loans.

Dated: New York, New York April 16. 1973

Yours, etc.

SALON, ORTNER, YAVERS, DERSHOWITZ AND RAYBIN

By: /s/ Harold B. Lawrence
Harold B. Lawrence

Attorneys for Plaintiffs

Office & P. O. Address; 200 Madison Avenue New York, New York 10016 Tel. #(212) 532-9194

TO: KREINDLER, RELKIN, OLICK & GOLDBERG, ESQS.
Attorneys for Defendants 500 Fifth Avenue
New York, New York 10036

[EXHIBIT F omitted]

NOTICE OF MOTION
JANUARY 4, 1973
AND SUPPORTING AFFIDAVITS

STEVEN FLAKS, WILLIAM J. HACKETT,
ESTELLE JACOBSON, IRVING ORENSTEIN,
MARTIN B. PERLMAN, SHARKLINE
INDUSTRIES, INC., JACK TOPPEL and
MILTON WEINGER,

72 Civ. 1901

REPORT AND RECOMMENDATION

Plaintiffs, :

- against -

DAVID I. KOEGEL and FLORA MIR CANDY : CORPORATION, :

Defendants.

This is a motion to compel answers to interrogatories. The interrogatories were served eleven months ago, on June 20, 1972. Plaintiffs first moved to compel answers on September 19, 1972. After a hearing before Magistrate Potter, the defendants' counsel agreed to answer the interrogatories and an order was deemed entered requiring the responses to be furnished within sixty days. The answers were not filed within the required period. On January 4, 1973, a second motion was made to compel the answers, and the matter was referred to the undersigned for hearing by Order of the Court dated January 31, 1973. A hearing was set down for February 23, 1973, at which time the defendants again indicated a willingness to answer the interrogatories if given additional time. Answers were then served, but they were insufficient. A third hearing was then had on April 17, 1973, and defendants were directed to submit supplemental responses by April 30,

1973. Several additional sets of supplemental responses were served but, in the opinion of plaintiffs' counsel, these responses were inadequate, prompting this fourth request. Plaintiffs' counsel also seeks the assessment of attorneys fees because of the extreme measures necessary in order to elicit proper responses from the defendants.

# Answers Claiming Inability To Locate Documents

As to a number of the interrogatories defendants have responded that they have been unable to locate the pertinent documents. The defendants have not adequately explained the absence of the pertinent books and records. Since they were apparently used during recent Chapter II proceedings, their alleged disappearance is particularly puzzling. It may well be, as suggested by plaintiffs' counsel, that they have not searched in several likely locations and that secondary the information could have been obtained from other sources such as David I. Koegel Enterprises, Inc. All of this however would be best explored at the deposition of David I. Koegel. Defendants, of course, should have a continuing obligation to supply answers to the interrogatories if the documents are located. Rule 26(e). Should depositions (or other discovery) establish that the defendants' failure to obtain the records and supply responsive answers to the interrogatories has been willful,

the conduct of the defendants can be dealt with at that time.

## Items As To Which Defendants Contend Rulings Are Necessary

Defendants' counsel contends that on interrogatories 45(b) and 66(b) rulings are necessary on their objections. They did not raise any objections to answering any of these interrogatories in the earlier motions. While their initial set of answers asserted objections, they were not pressed and there is nothing in the opposing papers to support them. Consequently, the objections are deemed waived and the defendant should respond to these items.

## Inadequate Answers

Items 20(a), (b), and (c) concern inter-corporate transactions between the corporate defendant and the David I. Koegel Enterprises, Inc., another corporation controlled by the individual defendant. The final supplemental answers to these interrogatories acknowledges such transactions but does not give complete details as to the dates or considerations for the various loans. The defendants should set forth the dates upon which each advance occured [sic], the amount of which loan, the terms thereof, and any documents which were given evidence in the transactions.

With respect to item 38 the defendants have been asked to set forth the terms of any promissory notes or other evidence of indebtedness concerning transactions of the corporation defendants. The answer refers to a document.

The document supplied is a blank form with the name of the payee eliminated and is obviously not a proper response to the interrogatory. (It should be noted that the supplemental answers are inconsistent with respect to the document involved, at one point claiming that it was a promissory note and at another time stating that it was a debenture.) The interrogatory should be answered in detail or a copy of the actual document involved should be supplied.

### Sanctions

It is apparent that the defendants have not been cooperating with their own counsel, much less plaintiffs' counsel, in affording discovery in this case. It is recommended that an order be entered directing that unless the defendants provide answers to items 20(a), (b) and (c), 38, 45(b) and 66(b) within twenty days after the date of the Court's Order that their Answer be stricken. It is further recommended, in view of the several motions necessary to reach this point, that attorneys fees be assessed against these defendants and in favor of the plaintiffs pursuant to Rule 37(a)(4) and (b)(2). Plaintiffs' counsel has supplied an affidavit indicating that he had spent over thirty hours on these motions as of last month. Several more hours have obviously been spent since on supplemental aspects of this matter. It is recommended that the Court assess attorneys fees in the amount of \$1,000 against the defendants because of their failure to make discovery as

required by the Federal Rules.

Respectfully,

/s/ Gerard L. Goettel
Gerard L. Goettel
United States Magistrate

DATED: New York, N.Y. May 22, 1973 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

EXHIBIT H

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUS-TRIES, INC., JACK TOPPEL and

72 Civ. 1901 MEL

MILTON WEINGER,

Plaintiffs,

----х

STIPULATION

-against-

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants. :

attorneys for the plaintiffs and the attorneys for the defendants that the oral examination of LORNA KOEGEL as a witness pursuant to plaintiffs' notice dated April 10, 1973, by [sic] and the same hereby is adjourned to June 6, 1973, at 10:00 A.M. and the examination upon oral examination of DAVID I. KOEGEL ENTERPRISES, INC. as a witness in the above action pursuant to plaintiffs' notice dated April 10, 1973, be and the same hereby is adjourned to June 7, 1973, at 10:00 A.M., both examinations to be conducted at the offices of the attorneys for the plaintiffs, Room 1511, 200

Stipulated and agreed that the witnesses shall produce upon such examinations any records in their possession the production of which is required by any subpoena issued pursuant to said notice; and it is further

Madison Avenue, New York, New York; and it is further

Stipulated and agreed that the Defendant FLORA MIR CANDY

CORP. will produce the records production of which was requested by notice dated April 10, 1973, at the offices of plaintiffs' attorneys on June 1, 1973, at 10:00 A.M.

Dated: New York, New York May 10, 1973

SALON, ORTNER, YAVERS, DERSHOWITZ & RABIN [sic], ESQS.

By: /s/ Harold B. Lawrence
Harold B. Lawrence

Attorneys for Plaintiffs

KREINDLER, RELKIN, OLICK & GOLDBERG, ESQS.

By: /s/ James P. Heffernan
James P. Heffernan

Attorneys for Defendants

[EXHIBIT I omitted]

TRANSCRIPT OF DEPOSITION
JUNE 7, 1973

#### EXHIBIT J

# LAW OFFICES KREINDLER, RELKIN, OLICK & GOLDBERG

DONALD L. KREINDLER DONALD B. RELKIN ARTHUR S. OLICK GEORGE E. GOLDBERG AVROM R. VANN 500 FIFTH AVENUE NEW YORK, NEW YORK 10036

(212)594-0600 CABLE: KROGLEGIS

DAVID S. LANDE
JAMES P. HEFFERNAN
STEVEN M. PESNER
THOMAS A. WINSLOW

June 7, 1973

Harold B. Lawrence, Esq.
Salon, Ortner, Yavers, Dershowitz & Rabin [sic], Esqs.
200, Madison Avenue
New York, New York 10016

Re: Flaks et al v. David I. Koegel and Flora Mir Candy Corporation

Dear Mr. Lawrence:

We are writing to advise you that as of today's date, we are no longer Counsel for Mr. David I. Koegel and Flora Mir Candy Corporation. We have withdrawn as Counsel with the consent of Mr. Koegel and Flora Mir.

We are aware that there is currently scheduled for 10 a.m. on June 7, 1973, the examination before trial of David I. Koegel Enterprises, Inc., as a witness in the above entitled matter. Prior to our withdrawal, effective immediately, we had intended to and offered to appear as Counsel on behalf of the witness, David I. Koegel Enterprises, Inc. This offer has been declined and our withdrawal obviously precludes us from proceeding.

Accordingly, in light of the foregoing we respectfully request that the deposition of David I. Koegel Enterprises, Inc., as a witness, be adjourned until such date as new Counsel is formally substituted. We are, of course, aware that if there is no substitution we shall have to apply to the Court for appropriate relief. We would appreciate being advised in connection with our request.

Very truly yours,

KREINDLER, RELKIN, OLICK & GOLDBERG

/s/ Arthur S. Olick

ARTHUR S. OLICK

ASO/e

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and MILTON WEINGER,

SUPPLEMENTAL AFFIDAVIT
: IN SUPPORT OF PLAINTIFFS MOTION TO DISMISS
: ANSWER

Plaintiffs,

: 72 Civ. 1901 (MEL)

- against -

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION

STATE OF NEW YORK )

COUNTY OF NEW YORK )

HAROLD B. LAWRENCE being duly sworn deposes and says:

I am an attorney at law associated with SALON,
ORTNER, YAVERS, DERSHOWITZ and RAYBIN, Esqs. attorneys for
plaintiffs in this action and am familiar with all the facts
and circumstances hereof. I submit the following supplemental
affidavit in support of my motion, dated June 13, 1973 for an
order dismissing the answer of the defendants by reason of
their continued obstruction of discovery proceedings in this
matter. The purpose of this supplemental affidavit is to advise the court that the facts set forth in defendant's affidavit
of said motion have been confirmed in papers submitted in support of a motion made by the defendants' attorneys for leave to
withdraw as their counsel in this action. The motion papers were

received by deponent by mail on June 14, 1973 after deponent had issued plaintiffs' motion to dismiss for service. The motion for leave to withdraw is returnable June 22, 1973.

The notice of motion requests relief, among other grounds, "on the ground that defendants have failed to cooperate with their attorneys . . ." The motion is supported by an affidavit of Arthur S. Olick, one of defendanta [sic] attorneys, sworn to on June 12, 1973.

In his affidavit Mr. Olick makes the following statements:

"3. The problems encountered by your deponent's law firm in connection with composing answers to plaintiffs' interrogatories have been legion. These problems have resulted in extensive motion practice and hearings before the Hon. Gerald L. Goettel, U.S. Magistrate. Deponent's firm has advised defendants on numerous occasions of the necessity and importance of furnishing the information sought by plaintiffs' interrogatories. Nevertheless, it has been extremely difficult to obtain defendants' full cooperation.

### "BASIS FOR WITHDRAWAL

- "4. Deponent's firm has not received the cooperation it demands of its clients, particularly with respect to the preparation of answers to the numerous interrogatories propounded by plaintiffs.
- "5. Originally, deponent's firm was withdrawing from this matter with the consent of the defendants. Such consent was given on June 6, 1973, the day before defendant Koegel was supposed to testify as a witness in this matter. Deponent's firm offered to appear with Mr. Koegel at the deposition then scheduled but Mr. Koegel refused our offer. Such refusal was made even though Mr. Koegel was advised that his failure to appear could substantially harm his case.

"6. On June 7, 1973, Mr. Koegel called deponent and revoked his consent to our with-drawing from this case. He refused to obtain substitute counsel while refusing, at the same time to pay for services rendered and to be rendered.\*\*\*

(Italics supplied)

It is apparent from the beginning that the defendants' failure to furnish information up to this point in the action has been deliberate and with obstructive intent as charged in plaintiffs' motion. It is further apparent that the defendants intend to continue obstructing disclosure, notwithstanding the orders of this Court. The defendant Koegel, not only is unwilling to make disclosure but is plainly attempting to create a disruptive situation in which inability of counsel to act will further impede the progress of this action and delay the ultimate day when he is compelled to make the disclosures required by Magistrate Goettel. Mr. Koegel's attorneys state that he refused to pay his attorneys and refuses to comply with orders for disclosure or with notices to appear for examination, all contrary to their advice. At the same time, he refuses to consent to their withdrawal from the case and refuses to retain other counsel. This contradictory behavior is unquestionably a stall for more time.

It is noteworthy that this misconduct on Koegel's part occurs at a critical point in the discovery proceedings.

Koegel has lost a ten month battle to avoid furnishing data relating to intercorporate transactions between Flora Mir Candy Corporation and David I. Koegel Enterprises, Enc., his own

private investment conduit. He refused to furnish the data in response to interrogatories. Magistrate Goettel recommended that the defendants be ordered to answer on pain of dismissal of the defendants' answer if they refused. In this connection, an examination before trial of David I. Koegel Enterprises, Inc., was scheduled for May 15, 1973 and adjourned at the request of defendants' counsel to June 7. Koegel's attorney stated he was the only person who had knowledge of the affairs of David I. Koegel Enterprises, Inc., and that he would appear as president of the corporation on the adjourned date. Of course he refused to appear.

Koegel is attempting to disrupt the proceedings at this crucial point by tying the case up in a procedural knot. He seeks to preclude plaintiffs from taking the necessary action to compel his appearance or dismiss his answer, by creating a delay in the guise of a problem of legal representation for defendants. They are now represented by unpaid counsel who want to withdraw and Koegel is fighting them as well as the plaintiffs every step of the way. By his reckoning, this situation ought to tie the case up for the balance of the summer.

It is respectfully submitted that dismissal of the defendants' answer would be justified on the basis of the defendants' present tactics alone. However, these tactics and the statements contained in Mr. Olick's affidavit constitute overwhelming substantiation of the points made in plaintiffs' two motions to dismiss the answer. Together with Magistrate Goettel's findings respecting defendants' lack of cooperation, it is

very clear that no reason exists to anticipate any improvement in the defendants' conduct.

WHEREFORE, deponent respectfully requests that plaintiffs' motions be granted and the defendants' answer dismissed.

/s/ Harold B. Lawrence Harold B. Lawrence

Sworn to before me this 18th day of June, 1973.

/s/ Louis Raybin
Louis Raybin
Notary Public, State of New York
No. 24-8504925
Qualified in Kings County
Certificate filed in New York County
Term Expires March 30, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

:

STEVEN FLAKS, WILLIAM J. HACKETT, ESTELLE JACOBSON, IRVING ORENSTEIN, : 72 Civ. 1901 (MEL) MARTIN B. PERLMAN, SHARKLINE INDUSTRIES, INC., JACK TOPPEL and : MILTON WEINGER,

NOTICE OF SUBMISSION OF ORDER

Plaintiffs,

- against -

DAVID I. KOEGEL and FLORA MIR CANDY CORPORATION,

Defendants. :

SIR:

PLEASE TAKE NOTICE, that the following is a true copy of an order which has been submitted for signature to Hon. Morris E. Lasker, United States District Judge.

Dated: New York, New York August 17, 1973.

Yours, etc.,

SALON, ORTNER, YAVERS, DERSHOWITZ, and RAYBIN Attorneys for Plaintiffs Office and Post Office Address 200 Madison Avenue New York, New York 10016 Tel. (212) 532-9194

TO: FLORA MIR CANDY CORPORATION c/o Hotel Kenmore 145 East 23rd Street New York, New York

> Mr. David I. Koegel c/o Hotel Kenmore 145 East 23rd Street New York, New York

# [Exhibit E to Defendants' Answers to Interrogatories]

### PURCHASE AGREEMENT

September 6, 1968

Flora Mir Candy Corporation 145 East 23rd Street New York, New York

Gentlemen:

Each of the undersigned hereby agrees with Flora Mir Candy Corporation, a New York Corporation (hereinafter referred to as the "Company") as follows:

agrees to purchase from the Company, and the Company agrees to sell to each of the undersigned, at 10:00 A.M. on September 16, 1968, at the offices of Herrick, Feinstein, Rossman & Mendelson, 2 Park Avenue, New York, New York, upon the terms and conditions hereinafter set forth, the principal amount of the Company's 5% Subordinated Convertible Debentures, set forth opposite his, her or its name in Exhibit A annexed hereto for a price equal to the principal amount thereof. (Hereinafter, (i) said time on said date is referred to as the "Closing Time", (ii) said date is referred to as the "Closing Date", (iii) said place is referred to as the "Closing Place", (iv) said 5% Subordinated Convertible Debentures, which shall be substantially in the form of Exhibit B annexed hereto, with appropriate insertions in the blanks thereof, together with any of said 5% Subordinated Convertible Debentures

which may be issued in substitution thereof, are referred to as the "Debentures" and (v) the common stock of the Company, together with any other equity securities which may be issued by the Company in addition thereto or in substitution thereof, is referred to as the "Common Stock.") Such sale and purchase shall be consummated (I) by the Company delivering to each of the undersigned, at the Closing Time and at the Closing Place, duly executed and authenticated Debentures of a principal amount equal to the principal amount of Debentures set forth opposite his, her or its name in Exhibit A annexed hereto, payable to his, her or its order, and (II) by each of the undersigned delivering to the Company, at the Closing Time and at the Closing Place, a certified check or bank cashier's check for said principal amount, payable to the Company's order in New York City Clearing House funds.

- 2. <u>Investment Intent</u>. Each of the undersigned represents and warrants to the Company that he, she or it intends, and at the Closing Time will intend, to acquire the Debentures issuable to him, her or it pursuant to Section 1 hereof for the purposes of investment and not with a view to the sale or distribution thereof.
- 3. <u>Disclosure of Information</u>. The Company has heretofore delivered to each of the undersigned an unaudited financial
  statement of the Company as at May 31, 1968, and the Company
  covenants to deliver to the undersigned, within sixty (60) days
  after the Closing Date, an audited financial statement of the
  Company as at May 31, 1968 by an independent Certified Public

Accountant, which statement shall not be substantially different from the unaudited statement. Each of the undersigned acknowledges that he, she or it was not induced to enter into this Purchase Agreement by any information, representation or other statement not contained in this Purchase Agreement or in the Debentures

OR FELOSHOL & FRANK and that neither Herrick, Feinstein, Rossman & Mendelson, nor any of their partners, employees or other agents, shall have any liability to him, her or it arising out of or in connection with any statement contained in said financial statements or any omission therein or any of the transactions contemplated by this Purchase Agreement [sic].

- 4. Pre-Closing Covenant. The Company agrees that (a) subsequent to the date hereof and prior to the Closing Date, it will not declare or pay any dividend, issue any stock dividend or otherwise make any distribution with respect to shares of the Common Stock and (b) it has not fixed, and it will not fix, as a record date, any day on or prior to the Closing Date for the purpose of determining the owners of shares of the Common Stock in connection with any such dividend, stock dividend or other distribution.
- 5. Conditions of the Undersigned's Obligations. The obligations of each of the undersigned under this Purchase Agreement are subject to the fulfillment, at or prior to the Closing Time, of each of the following conditions, any of which may be waived, at or prior to the Closing Time, by a written instrument

signed by those of the undersigned who have agreed to purchase, in the aggregate, more than fifty percent (50%) of the Debentures pursuant to the terms of this Purchase Agreement:

- 5.1 Representations and Warranties. The representations and warranties of the Company contained in this Purchase Agreement shall be true at and as of the Closing Time in all respects as though such representations and warranties were made at and as of such time.
- 5.2 Agreements and Conditions. The Company shall have performed and have complied with all agreements and conditions required by this Purchase Agreement to be performed and complied with by it prior to or at the Closing Time.
- 5.3 Events of Default. There shall exist, at the Closing Time, no condition with respect to any of the Company and the Subsidiaries which constitutes, or which after any notice or upon the lapse of any period or both might constitute, an "Event of Default". (Herein, the term "Event of Default" shall have the meaning ascribed to it by the provisions of the Debentures.)
- 5.4 Compliance Certificate. The Company shall have delivered to the undersigned (a) the certificate of its President, dated the Closing Date, certifying to the fulfillment of the conditions specified in Sections 5.1, 5.2 and 5.3 hereof and (b) such other

evidence with respect to the fulfillment of any of the said conditions as you may reasonably request upon reasonable prior notice.

- 6. Conditions to the Company's Obligations. The obligations of the Company under this Purchase Agreement are subject to the fulfillment of the condition, at or prior to the Closing Time, that those of the undersigned who shall have agreed to purchase at least \$400,000 principal amount of Debentures shall perform all agreements required by this Purchase Agreement to be performed by them at or prior to the Closing Time, which condition may be waived, at or prior to the Closing Time, by a written instrument signed by the Company.
- 7. Expenses. The Company will pay, and save each of the undersigned harmless from, any and all liability with respect to stamp, original issue or similar taxes, if any, which may be payable or determined to be payable in connection with the execution and delivery of any of the Debentures or the Common Stock issued upon conversion of the Debentures.
- 8. Survival of Obligations. All covenants, agreements, representations, warranties, statements and certificates made herein, pursuant to the provisions hereof and in the Debentures shall, notwithstanding any investigation, be deemed material and relied upon and shall survive the Closing Date.
- 9. Amendments. This Purchase Agreement constitutes the entire understanding between the Company and each of the undersigned and no waiver or modification of the terms hereof shall be

valid unless in writing signed by the party to be charged and only to the extent therein set forth.

- 10. Parties in Interest. All the terms of this Purchase Agreement shall be binding upon, inure to the benefit of and be enforceable by the respective successors and assigns of the parties hereto, including, without limitation, the holders from time to time of the Debentures.
- 11. Limitation of Undersigned's Liability. The obligations of the undersigned under this Purchase Agreement shall be several and not joint, no default hereunder by any of the undersigned shall give rise to any liability on those of the undersigned not defaulting hereunder or, except as set forth in Section 6 hereof, release the Company from its obligations to such last mentioned of the undersigned and nothing contained herein shall constitute the undersigned a partnership, joint venture, association or other separate entity.
- and shall be delivered personally or shall be sent by registered or certified mail, return receipt requested; if given to the Company, shall be delivered or addressed to it, attention of its President, at 145 East 23rd Street, New York, New York, or at such other address of which the Company shall have given notice to all the holders of Debentures who have filed their names and addresses with the Company, with a copy to Herrick, Feinstein, Rossman & Mendelson, Esqs., 2 Park Avenue, New York, New York 10016, and, if given to any of the undersigned prior to the

Closing Time, shall be delivered or addressed to them, at their respective addresses set forth opposite their names in Exhibit A annexed hereto, with a copy to Joel M. Walker, Esq., 280 Park Avenue, New York, New York 10017.

- 13. Securities Act. The undersigned hereby acknowledge that they understand that neither the Debentures nor the shares of Common Stock issuable upon conversion of the Debentures have been registered under the Securities Act of 1933, as amended.
- 14. <u>Headings</u>. The headings of this Purchase Agreement have been inserted as a matter of convenience, and shall not affect the construction hereof.
- 15. Counterparts. This Purchase Agreement may be executed in any number of counterparts, each of which shall constitute an original and all of which, taken collectively, shall constitute but one and the same instrument.
- 16. Applicable Law. This Purchase Agreement shall be governed by and construed in accordance with the laws of the State of New York.
- 17. Representations and Warranties. The Company represents and warrants that:
- 17.1 Organization. The Company is, and at the Closing Time will be, a corporation duly organized, validly existing and in good standing under the laws of the State of New York.
- 17.2 <u>Powers and Authority</u>. The Company has, and at the Closing Time will have the corporate power and authority to

carry on its business as such business is now and will then be 198a carried on.

- 17.3 <u>Financial Statements</u>. The audited consolidated balance sheet of the Company as at May 31, 1968 will show no substantial discrepancy from the unaudited balance sheet as at that date previously delivered to the Holder.
- 17.4 Adverse Developments. Since May 31, 1968 (a) there has been no material adverse change in the business of the Company or in the financial condition, assets or liabilities of the Company, and (b) there has not been any substantial loss, destruction or damage to any of the assets or properties of the Company.
- and performance of, and compliance with this Purchase Agreement and the Debentures will not result in the violation or breach of the Certificate of Incorporation, By-Laws or any obligation or of any order, writ, injunction, decree, statute, rule or regulation; and the Company is not a party to any contract or other instrument which materially and adversely affects it [sic] ability to perform its obligations under this Purchase Agreement or the Debentures.
- 17.6 Validity of Securities. The Debentures when issued pursuant to the terms hereof will be binding obligations of the Company, enforceable in accordance with their terms and the shares of Common Stock, when issued pursuant to the exercise of the conversion rights, will be validly issued and outstanding, fully paid and nonassessable.
- 17.7 <u>Authorization</u>. The Board of Directors of the Company has approved the entering into of this Purchase Agreement and the consummation of the transaction contemplated herein and shareholder approval is not required therefor.

- 17.8 No Other Offer. The Company has not offered the Debentures to any other person or persons.
- Counsels' Opinion. In addition to the other documents required to be delivered on the Closing Date, the Company shall deliver to the undersigned an opinion of its Special Counsel, Feldshuh & Frank, dated as of the Closing Date to the effect that the Debentures being delivered pursuant hereto are exempt from the requirements of registration under the Securities Act of 1933, as amended. However, such opinion with respect to the aforesaid exemption shall be based upon and limited to the facts set forth in the affidavit of Stuart Graff and Ronald Neumark of even date herewith and such facts with respect to the acts of the Company and/or its agents as may be within the knowledge of said counsel. In addition the Company shall deliver to the undersigned an opinion of its General Counsel, Herrick, Feinstein, Rossman & Mendelson dated as of the Closing Date to the same effect as the representations contained in paragraphs 17.1, 17.2, 17.5 through the semicolon with the addition of any agreements within the knowledge of said counsel, 17.6 and 17.7.
- 19. <u>Definition of "Substantially Different"</u>. In order for the audited statement referred to in paragraph 3 of this Agreement to be "substantially different" from the unaudited statement, one of the following conditions must exist:
- (a) The working capital (current assets less current liabilities) of the Company must be diminished by more than \$200,000 from that shown on the unaudited statement, and David I.

Koegel shall have failed to cause to be loaned to the Company at prevailing interest rates for not less than one year, and without pledging the assets of the Company, that amount of money by which the diminution in working capital exceeds \$200,000.

- (b) The total assets of the Company must be less than \$3,000,000, as shown on the audited statement.
- (c) The long term liabilities must be in excess of \$1,300,000, as shown on the audited statement.
- (d) Company sales (taking the consolidated gross sales of Flora Mir Candy Corporation for the fiscal year ended May 31st, 1968 [handwritten insert illegible] and adding to it the gross sales of Martha Washington Kitchens, Inc. and subsidiaries, as represented by the seller of said Company in consolidated balance sheets dated as at September 30, 1967 and further adding to it the gross sales for the most recently completed fiscal year of all subsidiaries acquired since May 31st, 1968 as represented by the sellers of said subsidiaries to the Company) shall be at a rate less approximately \$10,000,000 per annum. If the audited statement is substantially different as defined above, or it [handwritten insert illegible] the undersigned may elect to rescind by giving the Company written notice by certified mail to such effect within fifteen (15) days after receipt of the audited statement. In the event that the undersigned elect to rescind, as aforesaid, the Company shall have ninety (90) days within which to return the moneys, with 50% interest thereon, and if said moneys are not returned in full within said ninety (90) day period, then David I. Koegel, by his signature at the foot

hereof, does hereby grant an irrevocable proxy to Stuart Graff and Ronald Neumark to vote all of his stock in the Company so long as any portion of said money remains unpaid, said proxy being an agency coupled with an interest. David I. Koegel agrees to execute and deliver such further documents as may reasonably be required to confirm said proxy.

20. The subordination of the Debentures shall only go into effect from and after the delivery of the audited statement referred to in paragraph 3 hereof and the expiration of the time within which the undersigned may rescind this agreement as set forth in paragraph 19 hereof.

Very truly yours,

/s/ Max Neumark

/s/ Abraham Sey

/s/ [signature illegible]
 SHARKLINE INDUSTRIES INC.
by /s/ William Cohen, Pres.

/s/ William J. Hackett

/s/ Stephen Flaks

/s/ Ronald Neumark

/s/ Stuart N. Graff

/s/ Milton Weinger

ACCEPTED AND AGREED TO:

FLORA MIR CANDY CORPORATION

By /s/ David I. Koegel
David Koegel, President

/s/ David I. Koegel
David Koegel

[signature and company illegible]

ACCEPTED AND AGREED TO:

FLORA MIR CANDY CORPORATION

By /s/ David I. Koegel
David Koegel, President

/s/ Estelle Jacobson

ACCEPTED AND AGREED TO:

FLORA MIR CANDY CORPORATION

By /s/ David I. Koegel
David Koegel, President

/s/ Jack Toppell	/s/	Jack	Toppell	
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ACCEPTED AND AGREED TO: FLORA MIR CANDY CORPORATION

By /s/ David I. Koegel
David Koegel, President

/s/ Martin B. Perlman

ACCEPTED AND AGREED TO:
FLORA MIR CANDY CORPORATION

By /s/ David I. Koegel
David Koegel, President

CHANCELLOR [illegible] & CO. PROFIT SHARING PLAN

[signature illegible]

/s/ John G. Taylor

/s/ Chancellor [illegible]

ACCEPTED AND AGREED TO: FLORA MIR CANDY CORPORATION

5/13/1x

De achnowledge receipe og De Copies og Brieg & aggerdin

R. In Verga (Seey Tohn. Faurence)